TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 838

FREDERICK L. MOREHEAD, AS WARDEN OF THE CITY PRISON OF THE BOROUGH OF BROOKLYN, PETITIONER,

vs.

PEOPLE EX REL. JOSEPH TIPALDO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED MARCH 16, 1936.

CERTIORARI GRANTED MARCH 30, 1936.

SUPREME COURT OF THE UNITED STATES

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INDEX.

	Original	Print
Record on appeal to Court of Appeals of New York	1	1
Statement under Rule 41	1	1
Notice of appeal to Court of Appeals	3	2
Writ of habeas corpus	4	2
Petition for writ of habeas corpus	6	3
Return to writ of habeas corpus	11	6
Order of county court remanding for trial	12	6
Order appealed from	13	7
Order certifying that a constitutional question is involved	15	8
Opinion of Hon. Mitchell May	16	8
Waiver of certification	26	15
Clerk's certificate	27	17
Remittitur of Court of Appeals	28	17
Order on remittitur	32	19
Order allowing certiorari	35	21

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 6, 1936.

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[fol. 1]

IN COURT OF APPEALS OF NEW YORK

PEOPLE EX REL. JOSEPH TIPALDO, Relator-Appellant,

against

FREDERICK L. MOREHEAD, as the Warden of the City Prison in the Borough of Brooklyn, Respondent

STATEMENT UNDER RULE 41

This is a habeas corpus proceeding, instituted at Special Term of the Supreme Court, Kings County, on April 30th, 1935, to test the legality of the imprisonment of the relator. The relator was held in custody by the respondent in pursuance of an indictment by the Grand Jury of Kings County for an alleged violation of a mandatory order issued by the Industrial Commissioner under Article 19 of the Labor Law, popularly known as the Minimum Wage Law for Women and Minors (Laws of 1933, Chapter 584, in effect April 29th, 1933). The only question raised by the relator in this proceeding is addressed to the constitutionality of the statute for the violation of which he is held for trial, his contention being that the same contravenes the 14th Amend-
[fol. 2] ment to the Constitution of the United States and Article 1, Section 6 of the Constitution of the State of New York. A hearing was had herein before the Hon. Mitchell May, at Special Term, Part II of the Supreme Court, Kings County, on April 30th, 1935. On July 3rd, 1935, an order was entered by the Hon. Mitchell May dismissing the writ herein and directing that the relator be continued in bail to await his trial under the indictment aforesaid. On August 5th, 1935, the relator served and filed a notice of appeal to this Court from the order aforesaid. By order dated August 16th, 1935, the Hon. Frederick E. Crane, Chief Judge of this Court, certified that a constitutional question is involved in this appeal and that this appeal may be taken without the security required by Section 593 of the Civil Practice Act.

Messrs. Goldberg & Levitt, are the attorneys for the relator and the Hon. John J. Bennett, Jr., Attorney General of the State of New York, appears for the respondent. The

original parties and attorneys are as above, and there has been no change of parties or attorneys since the commencement of this proceeding.

[fol. 3] In Supreme Court of New York, County of Kings

[Title omitted]

Notice of Appeal to Court of Appeals

Sirs:

Please take notice, that Joseph Tipaldo, the above-named relator, hereby appeals to the Court of Appeals from the order made by the Hon. Mitchell May herein on July 3rd, 1935, and entered in the office of the Clerk of the County of Kings on said day, whereby the above entitled habeas corpus proceeding was dismissed and the bail of the relator continued pending his trial in the County Court of Kings County under indictment No. 8566 B; and that the only question involved upon this appeal is the validity of the statute, for the violation of which the relator was indicted, under the Constitution of the State of New York and of the United States.

Dated, New York City, August 2nd, 1935.

Goldberg & Levitt, Attorneys for Relator-Appellant, 415 Lexington Avenue, New York City.

[fol. 4] To John J. Bennett, Jr., Attorney General of the State of New York. John N. Harman, Esq., Clerk of the County of Kings.

In Supreme Court of New York, County of Kings

[Title omitted]

Writ of Habeas Corpus

The People of the State of New York, to Frederick L. Morehead as the Warden of the City Prison in the Borough of Brooklyn:

We command you that you have the body of Joseph Tipaldo, by you imprisoned and detained, as it is said, to-

gether with the time and cause of such imprisonment and detention, by whatsoever name the said Joseph Tipaldo [fol. 5] is called or charged, before the Supreme Court at a Special Term, Part II thereof, to be held in and for the County of Kings, at the County Court House, Borough Hall, in the Borough of Brooklyn, City and State of New York, on the 30th day of April, 1935, at 2:30 o'clock in the afternoon of that day, to do and receive what shall then and there be considered, concerning the said Joseph Tipaldo. And have you then there this writ.

Witness, the Honorable Mitchell May, one of the Justices of the said Supreme Court the 30th day of April, in the year nineteen hundred and thirty-five.

John N. Harman, Clerk.

Let the foregoing writ issue.
April 30, 1935.

Mitchell May, Justice of the Supreme Court. Goldberg & Levitt, Attorneys for Relator, 415 Lexington Avenue, New York City.

[fol. 6] In Supreme Court of New York, County of Kings

[Title omitted]

Petition for Writ of Habeas Corpus

To the Honorable, the Supreme Court of the State of New York:

Your petitioner respectfully alleges and shows:

1. That Joseph Tipaldo, the petitioner, makes application herein on his own behalf for a writ of habeas corpus. That the place where the said Joseph Tipaldo is imprisoned and restrained of his liberty is the City Prison in the Borough of Brooklyn, County of Kings, City and State of New York. That the officer by whom he is so imprisoned and restrained is Frederick L. Morehead, the Warden of the aforesaid City Prison.

2. That the said Joseph Tipaldo has not been committed and is not detained by virtue of a judgment, decree, final

order, mandate or process specified in Section 1231 of the Civil Practice Act.

[fol. 7] 3. That the cause or pretense of the imprisonment and restraint of the said Joseph Tipaldo is that he has been indicted by the Grand Jury of Kings County for an alleged violation of a mandatory order issued by the Industrial Commissioner under Article 19 of the Labor Law, commonly known as the minimum wage law for women and minors (Laws of 1933, Chapter 584, in effect April 29th, 1933). The indictment under which the petitioner was indicted charges that the petitioner, as manager of the Spotlight Laundry in the County of Kings, disobeyed a mandatory order prescribing certain minimum wages for certain adult women employees of the said laundry. It is further charged that the petitioner conspired to make false entries in the time book of the said laundry for the purpose of making it appear that the said adult women employees did in fact receive the amount of wages ordered to be paid by the Industrial Commissioner.

4. That the imprisonment and restraint of the said Joseph Tipaldo is illegal in that he is being held for trial under indictments which charge the violation of a law which contravenes the Fourteenth Amendment to the Constitution of the United States and Article I, Section 6 of the Constitution of the State of New York in that the same operates as a deprivation of liberty or property without due process of law and also operates to compel the petitioner to be a witness against himself in a criminal case.

a) The petitioner does not question the constitutionality of the law in question in so far as the same purports to [fol. 8] fix a minimum wage for minors. He does, however, charge that the same is unconstitutional and violative of both the Federal and the State Constitutions in so far as the same purports to prescribe a minimum wage for adult women. In that regard the petitioner respectfully directs attention to the holding of the Supreme Court of the United States which tribunal is the final interpreter of the Constitution of the United States. The petitioner is informed that the Supreme Court had before it a statute substantially identical with that under which he is now imprisoned. In the case of Adkins v. Childrens Hospital, 261

U. S. 525, 24 A. L. R. 1238, 43 Sup. Ct. Rep. 394. That the determination of the Supreme Court of the United States in that case applies with full force and effect to State legislation which purports to fix a minimum wage for adult women was decided in the case of Topeka Laundry Co. v. Court of Industrial Relations, 119 Kan., 12, 237 Pac. 1041, 47 A. L. R. 208.

5. That in addition to the constitutional defects pointed out in the cases above cited, Article 19 of the Labor Law violates the Fifth Amendment to the Constitution of the United States, as well as Article I, Section 6 of the Constitution of the State of New York in that the said law empowers the Industrial Commissioner or his representative "to enter the place of business or employment of any employer of women and minors in any case for the purpose of [fol. 9] examining and inspecting any and all books, registers, payrolls and other records of any employer of women or minors that in any way appertain to or have a bearing upon the question of wages of any such women or minors and for the purpose of ascertaining whether the orders of the Commissioner have been and are being complied with" (Section 553). The refusal to permit an examination of books and records under this section is made a crime (Section 565). In this fashion a person is virtually compelled to give evidence against himself in a criminal case.

6. That no previous application has been made for the writ herein asked for.

7. That no appeal has been taken from any order or judgment in any action or proceeding against the said Joseph Tipaldo whereby he has been imprisoned or restrained of his liberty.

Wherefore, your petitioner prays that a writ of habeas corpus directed to the said Frederick L. Morehead issue for the purpose of inquiring into the cause of the imprisonment and restraint of the said Joseph Tipaldo and of delivering him therefrom, pursuant to the statute in such case made and provided.

Joseph Tipaldo, Petitioner.

[fol. 10] *Duly sworn to by Joseph Tipaldo. Jurat omitted in printing.*

[fol. 11] In Supreme Court of New York, County of Kings

[Title omitted]

Return to Writ of Habeas Corpus

To the Honorable Mitchell May or any Justice of the Supreme Court, State of New York, County of Kings:

Obedient to the Commands of the Writ allowed and served upon me, and hereby annexed:

I hereby certify and return that when the said Writ came to me and on the 30th day of April, 1935, the said Joseph Tipaldo named therein was and still is in my custody and detained by me as Warden of the City Prison of the City of New York, Borough of Brooklyn, in the County of Kings, under and by virtue of a mandate, order and commitment, bearing date the 30th day of April, 1935, made by County Judge Honorable Algeron I. Nova, Judge of the County Court of Kings County, New York, and for no other cause.

Annexed hereto and made part of this return is a copy of the original mandate, order and commitment, which original order, mandate and commitment I now produce and I [fol. 12] have here the body of said Joseph Tipaldo as by said writ I am commanded.

Dated, Brooklyn, New York, April 30, 1935.

F. L. Morehead, Warden, City Prison, City of New York, Borough of Brooklyn.

In County Court of Kings County

Present—Hon. Algeron I. Nova, County Judge.

The People of the State of New York

against

Joseph Tipaldo

Indicted for Forgery—Third Degree

Order Remanding for Trial—April 30, 1935

It is ordered by the Court that the said Joseph Tipaldo be and is hereby committed to the custody of the Commis-

[fol. 13] sioner of Correction, City of New York, to be by him detained in the Common Jail of the County of Kings, for recall for trial when directed.

A true extract of the minutes.

Bail fixed at $—.

John N. Harmon, Clerk.

In Supreme Court of New York, Kings County

Present—Hon. Mitchell May, Justice.

People ex Rel. Joseph Tipaldo, Relator-Appellant,

against

Frederick L. Morehead, as the Warden of the City Prison in the Borough of Brooklyn, Respondent

Order Appealed From—July 3, 1935

Upon the petition for a writ of habeas corpus herein filed and the writ of habeas corpus thereon issued, and [fol. 14] upon the return thereto, also filed, and upon the proceedings had before this Court, and after hearing Goldberg & Levitt, Esqs., attorneys for the relator, upon the motion to discharge the relator and John J. Bennett, Jr., Attorney General of the State of New York, by John F. X. McGohey, Assistant Attorney General in opposition thereto, it is

Ordered that the said writ of habeas corpus be and the same is hereby dismissed, and that bail in the amount of Two thousand five hundred dollars ($2,500) heretofore set by this Court be and the same is continued until the trial of the relator under Indictment No. 8566 B, returned in the County Court of the County of Kings against the said relator and others and that the relator not depart the said County Court without leave and abide by the judgment and order of the Court.

Enter.

Mitchell May, J. S. C.

Granted July 3, 1935. John N. Harman, Clerk.

[fol. 15] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

ORDER CERTIFYING THAT A CONSTITUTIONAL QUESTION IS INVOLVED

Upon reading the petition of the above-named relator, dated April 30th, 1935, the writ of habeas corpus issued thereon on said day, the return to the said writ made by the above-named respondent, the order made by the Hon. Mitchell May, at Special Term of the Supreme Court, Kings County, on July 3rd, 1935, dismissing the said writ and continuing the bail of the relator, the notice of appeal to the Court of Appeals from the said order, which said notice bears date August 1, 1935, the annexed affidavit of Harry Goldberg, verified August 1st, 1935, from which it appears that the only question involved upon this appeal is the validity of the statute, for the violation of which the relator was indicted, under the Constitutions of the State of New York and of the United States.

The undersigned, Chief Judge of the Court of Appeals, does hereby certify, that a constitutional question is in-
[fol. 16] volved in this appeal, to wit, the constitutionality of Article 19 of the Labor Law of the State of New York, commonly known as the minimum wage law for women and minors, and that this appeal may be taken without the security required by Section 593 of the Civil Practice Act.

Dated, Brooklyn, N. Y., August 16th, 1935.

Frederick E. Crane, Chief Judge of the Court of Appeals.

IN SUPREME COURT OF NEW YORK

OPINION OF HON. MITCHELL MAY

People ex rel. Tipaldo v. Morehead.—This is a proceeding by habeas corpus instituted by the relator to test the validity of a new article added to the Labor Law known as article 19, passed by the Legislature in 1933 and entitled "Minimum Fair Wage for Women and Children." The relator is imprisoned under an indictment which charges in substance that he, as manager of a laundry in Brooklyn,

paid adult women employees a lesser sum than the minimum wage fixed for that class of employees by the Industrial Commissioner pursuant to the provisions of the act. He asserts that the statute contravenes the 14th Amendment of the Federal Constitution and article 1, section 6, of the Constitution of the State of New York, in that it operates to deprive him of liberty and property without due process of law, and also operates to compel him to be a witness against himself in a criminal case.

[fol. 17] Section 550, the first section of the new article, recites the factual situation which, in the opinion of the Legislature, justified the enactment as a valid exercise of the police power. These recitals are in substance as follows: That the employment of women and minors in trade and industry in this state at wages unreasonably low and not fairly commensurate with the value of the services rendered is a matter of "grave and vital concern"; that many women and minors so employed are not as a class upon a level of equality in bargaining with their employers in regard to "minimum fair wage standards," and "freedom of contract" as applied to their relations with their employers is illusory; that since a very large percentage of such workers are obliged to support themselves and others from their weekly wages they are by reason of their "necessitous circumstances" forced to accept whatever wages are offered them; that judged by any reasonable standard wages in many cases are fixed by "chance and caprice" and bear no relation to the fair value of the services rendered. The remaining portion of the section reads as follows: " * * * Women and minors employed for gain are peculiarly subject to the overreaching of inefficient, harsh or ignorant employers and under unregulated competition, where no adequate machinery exists for the effective regulation and maintenance of minimum fair wage standards, the standards such as exist tend to be set by the least conscionable employers. In the absence of any effective minimum fair wage rates for women and minors, the constant lowering of wages by unscrupulous employers [fol. 18] constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers and threatens the stability of industry. The evils of oppressive, unreasonable and unfair wages as they

affect women and minors employed in the state of New York are such as to render imperative the exercise of the police power of the state for the protection of industry and of the women and minors employed therein and of the public interest of the community at large in their health and well-being and in the prevention of the deterioration of the race. In the considered judgment of the Legislature this article is constitutional."

The statutes defines an "oppressive and unreasonable wage" and a "fair wage," and section 552 declares it to be against public policy to employ any woman or minor in an occupation in this state at an oppressive and unreasonable wage as defined by the foregoing provisions. By other provisions there is set up a comprehensive scheme with adequate machinery to carry into effect the purpose of the act.

The underlying thought of relator's contention appears to be that the right of freedom of contract emanates from the Fifth Amendment to the United States Constitution, which provides that no person shall be deprived of life, liberty or property without due process of law; and consequently that the minimum wage law here under consideration, in that it deprives an adult woman in full possession of her normal faculties of the right freely to contract with reference to her services, violates the similar inhibition upon states found in the due process clause of the Fourteenth Amendment.

[fol. 19] In support of his contention relator relies principally upon the case of Adkins v. Children's Hospital (261 U. S. 525). In that case the court decreed the unconstitutionality of an act fixing the minimum wages for women and children in the District of Columbia. The court there asserted that it was no longer open to question that the right to contract with reference to one's affairs is a part of the liberty of the individual which is protected by the due process clause of the Fifth Amendment, that included in the right of personal liberty and private property is the right to contract for the acquisition of property, and that chief among such contracts is that of personal employment whereby labor and other services are exchanged for money or other forms of property. After reference to decisions, sustaining the validity of statutes relating to businesses "impresed with a public

interest" and to decisions relating to statutes limiting the hours of labor in certain industries, including the case of Muller v. Oregon (208 U. S. 412), the court wrote as follows: "* * * But the ancient inequality of the sexes, otherwise than physical, as suggested in the Muller case (p. 421) has continued 'with diminishing intensity.' In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point. In this aspect of the matter, while the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions [fol. 20] of work may properly take them into account, we cannot accept the doctrine that women of mature age, sui juris, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships. * * *"

Notwithstanding the force and cogency of this reasoning, this court is not prepared to assert that the Adkins case is an authority which impellingly necessitates an adjudication of the invalidity of the statute here involved. It is of special significance that in the Adkins case, with reference to the conception of liberty as involved in the words "right of contract" the court wrote: "'And interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, *unless it be supportable as a reasonable exercise of the police power of the State.*'" (Italics ours.) And again with reference to freedom of contract the court wrote: "There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; *and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances* * * *." (Italics ours.)

[fol. 21] Here is a distinct and unequivocal pronouncement that a reasonable exercise of the police power may work an interference with liberty of contract that is not necessarily to be deemed arbitrary, and that an abridgement of that right may be justified by "exceptional circumstances."

The primary question here involved is whether, within the purview of the principles thus enunciated, the interference with the right to contract, effected by the minimum wage law may be justified as an exercise of the police power, reasonable because justified by existing conditions, or to state it otherwise, whether the abridgement of freedom of contract may be sanctioned "by the existence of exceptional circumstances" within the rule above stated.

An attempt to exhaustively review the substance of oral and written characterizations of the effect of the world-wide depression would serve no useful purpose. The court may take judicial notice that almost without warning it came upon mankind with an unforeseen and irresistible onrush that bound and fettered the world in its devastating grip. Business collapsed; our conceptions of economic and social securities were shattered, peace of mind was transformed into dread apprehension, contentment into unrest, comfort gave way to hardship and sufficiency to privation. As a result of this universal catastrophe, thousands of women reared to a life of ease, maintained in comfortable surroundings, inexperienced with the hardship of poverty, with no occupational training and with no business experience, suddenly found themselves engulfed in the whirlpool of indus-[fol. 22] trial strife, forced there by a calamity of hitherto unknown magnitude, compelled to there engage in a merciless and to them unfamiliar competition.

Do the dictates of reason and the common experience of mankind impel the conclusion that under these conditions these women are on a parity with men in their ability to distinguish between legitimate and unscrupulous business practices, between the honest and dishonest employer, between fair dealing and chicanery, between "an oppressive and unreasonable wage" and a "fair wage" as defined in the act? The Legislature has answered the inquiry in the negative as evidenced by the last sentence in section 550, which reads: "In the considered judgment of the Legislature this article is constitutional."

This declaration, unusual in a statute, indicates a legislative familiarity with the decisions of the higher courts with reference to legislation of this general character and amounts to a pronouncement that in the Legislature's opinion, the act in so far as it interferes with liberty of contract, is justified as a reasonable exercise of the police power by the existence of these "exceptional circumstances."

The act evidences a humane legislative intent to ameliorate human distress by affording a measure of security to women who, by reason of unprecedented adverse conditions existing at the time, were unable to adequately protect themselves in an industrial life in which, as compared with men, they were at a disadvantage. Thus, its ultimate purpose was to protect women from unscrupulous employers through the medium of a compulsory wage reasonably commensurate with the services rendered, and also to pro- [fol. 23] tect industry from evils which are frequently followed by unfair competition made possible by the exploitation of a designated class of employees. It would seem that public welfare is enhanced by legislation based upon humane consideration of this character, legislation justified as an exercise of the police power. The Adkins case was decided at the time of an era of comparative prosperity. This court is not prepared to assert that the same conclusion would have been reached had economic and industrial conditions then been as they were at the time of the enactment here involved.

The police power is inherently vested in the Legislature. It was never surrendered by the several states and consequently its free exercise is not necessarily impeded by the 14th Amendment to the Federal Constitution. Through the exercise of this power "the state may regulate the relative rights and duties of all persons within its jurisdiction, so as to guard the public safety, protect the public morals, secure the public welfare and promote the common good and welfare" (People v. Byrne, 99 Misc. 1; Jacobson v. Mass., 197 U. S. 11, p. 25; People v. Adirondack R'y Co., 160 N. Y. 225, p. 236).

In the case last cited, in speaking of the power of taxation, the police power and the power of eminent domain, the court said that these powers "* * * underlie the Constitution and rest upon necessity, because there can be no effec-

tive government without them. They are not conferred by the Constitution, but exist because the state exists, and they are essential to its existence. They are not rights reserved, but rights inherent in the state as sovereign. While they [fol. 24] may be limited and regulated by the constitution, they exist independently of it as a necessary attribute of sovereignity. They belong to the state because it is sovereign, and they are a necessity of government. The state cannot surrender them, because it cannot surrender a sovereign power. It cannot be a state without them. They are as enduring and indestructible as the state itself."

Other well established legal principles are pertinent to the present inquiry.

Thus it is held that to warrant a court in declaring an act unconstitutional, the conflict between the statute and the constitution must be "plain and unmistakable" and "that every presumption is in favor of the validity of a legislative enactment" (People, &c., v. Ryan, 230 A. D. 252, p. 254; City of Buffalo v. Hawks, 226 A. D. 480, p. 485, aff'd. 251 N. Y. 588; People, &c., v. Carter & Rice, 135 N. Y. 473, p. 484; Gardner v. Genther, 232 A. D. 296, p. 298, aff'd 257 N. Y. 578).

And if a reasonable doubt exists as to its validity the act should be upheld. Every reasonable doubt must be resolved in favor of its validity (City of Buffalo v. Hawks, supra; Gardner v. Genther, supra).

Moreover, the acts of a Legislature are presumed to be "within its constitutional authority unless the contrary clearly appears" (Schieffelin v. Goldsmith, 253 N. Y. 243, p. 249; Matter of McAneny v. Board, 232 N. Y. 377, p. 389; People ex rel. Cotte v. Gilbert, 226 N. Y. 103, p. 106.

It is also the rule that one who asserts the invalidity of a statute or a classification must prove his contention (People [fol. 25] &c., v. Byrne, supra; Borden's Farm Products Co. v. Baldwin, 293 U. S. 194).

It has also been stated that: "As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute" (O'Gorman v. Insurance Company, 282 U. S. 251, p. 257-8; People &c., v. Katz, 140 Misc. 46, p. 47).

No proof of facts is here adduced in contradiction of the factual situation declared to exist by the Legislature.

These facts so deemed to exist form the basis for the conclusion that this legislation is not unconstitutional as exceeding the permissible bounds of the exercise of the police power, and it would not appear that it may be so decreed as matter of law.

Although the question is not here raised it may not be inappropriate to say that it does not appear that the minimum wage law evidences an unwarranted delegation of Legislature power to an administrative board or body. The act does not authorize the exercise of unlimited discretion in an undefined field. On the contrary a standard is prescribed. That standard is found in the definition of "a fair wage," which limits the authorized discretion of the administrative body within the confines indicated by the definition. In this respect the act is not defective for the reasons advanced in the recent decision of the United States Supreme Court in the Schechter case.

Without doubt, this legislation was prompted by humane and beneficent considerations. The intent was to protect a [fol. 26] designated class from injustice and exploitation, thereby also promoting the public welfare by diminishing one cause of unfair competition with its resulting industrial chaos.

The writ is accordingly dismissed.

IN SUPREME COURT OF NEW YORK

WAIVER OF CERTIFICATION

It is hereby stipulated, by and between the attorneys for the respective parties hereto, pursuant to Section 170 of the Civil Practice, Act, that the foregoing are true and correct copies of the notice of appeal, the order certifying that a constitutional question is involved, the order appealed from, and of all of the papers used upon the hearing of the writ of habeas corpus and upon which the said order appealed from was made, and of the whole thereof, now on file in the office of the Clerk of the County of Kings and that the appeal herein be heard upon the foregoing record without certification thereof which is hereby waived.

Dated, N. Y., October 29, 1935.

Goldberg & Levitt, Attorneys for Relator-Appellant.
John J. Bennett, Jr., Attorney General of the State of New York, Attorney for Respondent.

T. C. 12/6/35. E. B.

[fol. 27] STATE OF NEW YORK,
County of Kings, ss:

I, John N. Harman, Clerk of the County of Kings and Clerk of the Supreme Court of the State of New York in and for said County (said Court being a Court of Record) do hereby certify that I have compared the annexed with the original Notice of Appeal filed in my office — Order appealed from and all papers on which said order is based and that the same is a true transcript thereof and to the whole of such original.

(For Attorney General—no fee.)

In Testimony Whereof, I have hereunder set my hand and affixed the seal of said County and Court, this 9 day of March, 1936.

John N. Harman, Clerk. (Seal Kings County.)

[fol. 28] COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 3rd day of March, in the year of Our Lord One Thousand Nine Hundred and Thirty-Six, before the Judges of said Court.

Witness: The Hon. Frederick E. Crane, Chief Judge, Presiding. William J. Armstrong, Clerk.

PEOPLE ex Rel. JOSEPH TIPALDO, Relator-Appellant,

against

FREDERICK L. MOREHEAD, as the Warden of the City Prison, in the Borough of Brooklyn, Respondent

REMITTITUR—March 4th, 1936

[fol. 29] Be it remembered, that on the 6th day of December, in the year of Our Lord One Thousand Nine Hundred and Thirty-Five, Joseph Tipaldo, the appellant in this cause, came here into the Court of Appeals by Goldberg & Levitt, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Supreme Court, Kings County, and Frederick L. Morehead, as Warden of the City Prison, in the Borough of Brooklyn, the

respondent in said cause, afterwards appeared in said Court of Appeals by John J. Bennett, Jr., Attorney General.

Which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed. The Court of Appeals having heard this cause argued by Mr. Nathan L. Miller, of counsel for the appellant; and by Mr. Henry Epstein, for the respondent; and by Mr. Charles J. Campbell, for New York State Hotel Association, as amicus curiæ; brief filed by other amici curiæ; and after due deliberation had thereon, did order and adjudge that the order of the Supreme Court appealed from herein be, and the same hereby is reversed, the writ sustained and the prisoner discharged. A question under the Federal Constitution was presented [fol. 30] and necessarily passed upon by this Court, viz. that Chapter 584 of the Laws of 1933 of the State of New York contravenes the 14th Amendment of the Constitution of the United States. This Court held that the aforesaid statute does contravene the 14th Amendment of the Constitution of the United States (Adkin vs. Childrens Hospital, 261 U. S. 525).

And it was also further ordered that the record aforesaid and the proceedings in this Court be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be reversed, the writ sustained and the prisoner discharged, etc. as aforesaid.

And hereupon, as well the notice of appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, be it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided to be enforced according to law and which record now remains in the said [fol. 31] Supreme Court before the Justices thereof, etc.

(Signed) John Ludden, Deputy Clerk of the Court of Appeals of the State of New York. (Seal.)

Court of Appeals, Clerk's Office, Albany, March 4th, 1936.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein; attached thereto.

John Ludden, Deputy Clerk.

[fol. 32] [Stamp:] Office of the Clerk, Supreme Court, U. S., Received Mar. 14, 1936

At a special term, Part II, of the New York Supreme Court, held in and for the County of Kings, at the County Courthouse, in the Borough of Brooklyn, City of New York, this 6th day of March, 1936.

Present: Hon. Peter P. Smith, Justice.

PEOPLE ex Rel. JOSEPH TIPALDO, Relator-Appellant,

against

FREDERICK L. MOREHEAD, as the Warden of the City Prison in the Borough of Brooklyn, Respondent

The above named Relator having appealed to the Court of Appeals from the order made by the Hon. Mitchell May on July 3rd, 1935, and entered in the office of the Clerk of the County of Kings, on the said day, whereby the above entitled habeas corpus proceeding was dismissed, and the Court of Appeals having heard said appeal, and ordered and adjudged that the order so appealed from be reversed, the writ of habeas corpus sustained and the Relator discharged from custody, and the record remitted from that Court, having been filed, from which it appears that a question under the Federal Constitution was presented and necessarily passed upon by the Court of Appeals, viz, that Chapter 584, Laws of 1933 of the State of New York con-
[fol. 33] travenes the 14th Amendment of the Constitution of the United States and that the Court of Appeals held that the aforesaid statute does contravene the 14th Amendment of the Constitution of the United States (Adkins v. Childrens Hospital, 261 U. S. 525),

Now, on motion of Gates & Levitt, attorneys for the Relator, it is

Ordered, that the said judgment of the Court of Appeals be and the same is hereby made the judgment of this Court.

Enter.

(Signed) Peter P. Smith, J. S. C.

Granted Mar. 6, 1936. John N. Harman, Clerk.

O. K. 3/7/36. J. D.

STATE OF NEW YORK,
County of Kings, ss:

I, John N. Harman, Clerk of the County of Kings and Clerk of the Supreme Court of the State of New York in and for said County (said Court being a Court of Record) do hereby certify that I have compared the annexed with the original Order filed in my office Mar. 7, 1936, and that the same is a true transcript thereof and to the whole of such original.

(For Attorney General— no fee.)

In Testimony Whereof, I have hereunder set my hand and affixed the seal of said County and Court, this 9 day of March, 1936.

John N. Harman, Clerk.

[fol. 34] [Endorsed:] Index # 13595/1935. Supreme Court, County of Kings. People ex rel. Joseph Tipaldo, Relator-Appellant, against Frederick L. Morehead, as the Warden of the City Prison in the Borough of Brooklyn, Respondent. Original Order. John J. Bennett, Jr., Attorney-General, Attorney for Respondent, Office and Post Office Address: Capitol, Albany, N. Y., New York Office, 80 Centre Street, New York, N. Y. Personal service of a copy of within — is admitted this — day of ——, 193-.

[fol. 35] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 30, 1936

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Henry Epstein. File No. 40,392. New York Supreme Court. Term No. 838. Frederick L. Morehead, as Warden of the City Prison of the Borough of Brooklyn, petitioner, vs. People ex rel. Joseph Tipaldo. Petition for a writ of certiorari and exhibit thereto. Filed March 16, 1936. Term No. 838, O. T., 1935.

FILE COPY
No. 838

MAR 16
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM—1935

FREDERICK L. MOREHEAD, as the Warden of the City Prison of the Borough of Brooklyn,

Petitioner,

against

PEOPLE ex rel. JOSEPH TIPALDO,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND MOTION TO ADVANCE

JOHN J. BENNETT, JR.,
Attorney General, State of New York,
Attorney for Petitioner,

HENRY EPSTEIN,
Solicitor General, State of New York,
Counsel.

INDEX

	PAGE
Petition for Writ of Certiorari	3
Questions Presented	4
Statement of Facts	5
Reasons for Writ	8
Brief in Support of Petition	10–26
A. Opinions Below	10
B. Jurisdiction	11
C. Facts	12
D. Assignments of Error	12
E. Summary of Argument	14
Argument	16–26
Appendix	
A. Statute, Chapter 584, Laws 1933	27
B. Opinions of Courts Below	
1. Supreme Court	43
2. Court of Appeals	52
C. Order of Court of Appeals and Judgment Therein	83–87
Motion to Advance	88–90

Citations

Abie State Bank v. Byran, 282 U. S. 765	23
Adkins v. Children's Hospital, 261 U. S. 525	11 12, 16, 19, 22, 23
Atkin v. Kansas, 191 U. S. 207/223	24
Block v. Hirsh, 256 U. S. 135	23
Borden's Farm Products Co. v. Baldwin, 293 U. S. 194	23
Borden's Co. v. Ten Eyck, Decided Jan. 1936 U. S. Sup. Ct.	19
Bunting v. Oregon, 243 U. S. 426	19
Central Lumber Co. v. South Dakota, 226 U. S. 157	25
Chastleton Corp. v. Sinclair, 264 U. S. 543	23
Chicago etc. Ry. Co. v. Wellman, 143 U. S. 339/346	20

PAGE

German Alliance Ins. Co. v. Lewis, 233 U. S. 389/417 25
Griffith v. Connecticut, 218 U. S. 563..... 25
Highland v. Russell Car etc. Co., 279 U. S. 253/262 .....20, 25
Holden v. Hardy, 169 U. S. 366.....20, 23, 25
Hurtado v. California, 110 U. S. 516..... 23
Jacobson v. Massachusetts, 197 U. S. 11.... 21
Matter of Helfrick v. Dahlstrom Metallic Door Co., 256 N. Y. 199; 284 U. S. 594.... 17
McCulloch v. Maryland, 4 Wheat 316/431.... 24
McLean v. Arkansas, 211 U. S. 539.....20, 24
Missouri Pac. R. R. Co. v. Norwood, 283 U. S. 249 23
Mugler v. Kansas, 123 U. S. 623..... 24
Muller v. Oregon, 208 U. S. 412/420, 421.... 21
Nebbia v. New York, 291 U. S. 502.....19, 21, 24
N. Y. Central & H. R. R. Co. v. Williams, 199 N. Y. 108..... 25
O'Gorman & Young v. Hartford Ins. Co., 282 U. S. 251 .....19, 24
Radice v. New York, 264 U. S. 292.....19, 20, 25
Riley v. Massachusetts, 232 U. S. 671..... 25
Stettler v. O'Hara, 243 U. S. 629..... 25
Texas etc. R. R. Co. v. Railway Clerks, 281 U. S. 548 25

Statutes

Laws of New York 1933, Chapter 584.....11, 12 13, 14, 15, 16, 22, 23, 25
Labor Law New York State, Art. 19..... 61
District of Columbia Act of 1918, Chap. 174; 40 Stat. 964..... 16
Judicial Code of U. S., Sec. 27-(b); (28 U. S. C. A. Sec. 344)..... 11

Constitutional Provisions

United States Constitution, Fourteenth Amendment 11, 21

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1935

FREDERICK L. MOREHEAD, as the Warden of the City Prison of the Borough of Brooklyn,

Petitioner,

against

PEOPLE ex rel. JOSEPH TIPALDO,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the honorable chief justice and associate justices of the Supreme Court of the United States:

The above named Frederick L. Morehead, as the Warden of the City Prison of the Borough of Brooklyn, petitioner herein, prays for a writ of certiorari to review the order and decision of the Court of Appeals of the State of New York, being the court of last resort of that State, reversing a final order of the Supreme Court of the State of New York and sustaining a writ of habeas corpus and discharging the respondent prisoner (Record —Remittitur of Court of Appeals of New York). The order and judgment of the Court of Appeals were made the judgment of the Supreme Court

by the filing of the remittitur of said court with the County Clerk of Kings County on the 6th day of March, 1936, and the entry of the judgment and order of the Supreme Court on the same date. Copies of the orders and judgments are included with the Records and are annexed hereto (pp. 83–87).

The opinions of the Court of Appeals, majority and minority, were handed down on March 3, 1936. They appear in the Appendix hereto, pages 52–82. The remittitur was issued to the Supreme Court March 4, 1936. By the judgment and remittitur the Court of Appeals reversed the determination of the Supreme Court at Special Term and directed the discharge of the prisoner, respondent, basing its decision upon the determination, expressed in the Chief Judge's opinion, that the New York State Minimum Wage Law for Women and Minors (Chap. 584, Laws of 1933) is in violation of the Constitution of the United States, on the sole authority of the decision of this court in the case of *Adkins* v. *Children's Hospital*, 261 U. S. 525. The statute held to be invalid is printed in the Appendix hereto, page 27.

The determination was necessarily based on the provisions of the Fourteenth Amendment to the Constitution of the United States. Respondent does not oppose the issuance of the writ herein prayed for (p. 9 herein).

Questions Presented

1. In the light of the factual background of Chapter 584, Laws of 1933, declared in section 550 thereof by the legislature, and unchallenged by respondent Tipaldo, does said statute violate the provisions of the Fourteenth Amendment of the United States Constitution?

2. Do the provisions of Chapter 584, Laws of New York, 1933, operate to deprive the respondent Tipaldo of his liberty or property without due process of law in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States?

3. Is the decision of this court in *Adkins* v. *Children's Hospital*, 261 U. S. 525, declaring the 1918 Minimum Wage Law for Women in the District of Columbia (40 Stat. 964, c. 174) to be void, controlling in the consideration of Chapter 584, Laws of 1933, of New York State, in the case of *Tipaldo* v. *Morehead*, herein:

(a) In the light of the differences between the statutes themselves;

(b) In the light of economic conditions affecting women employed in New York State, shown to exist and unchallenged;

(c) In the light of the public policy stated by the legislature in section 552 on the basis of the findings stated in section 550 of the act?

Statement of Facts of the Case

Respondent herein, Joseph Tipaldo, was indicted for the crime of forgery, third degree, by the Kings County Grand Jury, November 2, 1934.

Respondent in concert with others conspired to and did forge and alter books of account and records in order to conceal disobedience to the provisions of the Minimum Wage Law for Women and Minors (Chap. 584, Laws of 1933; Art. 19, Labor Law of New York State). Among the charges was the conspiring to and making of "false entries" in the time book of said laundry for the purpose of making it appear that the

said adult women employees did in fact receive the amount of wages "ordered by the Industrial Commissioner" (fols. 19, 20).

The indictments all were based on the violation of the Minimum Wage statute which provides for the establishment of a minimum rate of wage for women and minors in certain industries, determined after inquiry and study of conditions therein, and provides for its enforcement and administration (fol. 19). The wrongs charged find their roots in the statute and upon arrest respondent Tipaldo sued out a writ of habeas corpus, attacking the statute as void and unconstitutional, in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States. He thereby sought to test the legality of his arrest and imprisonment.

On the hearing upon the writ of habeas corpus on April 30, 1935, before the Supreme Court of New York at Special Term, and in his petition for said writ, the relator (respondent Tipaldo) placed his reliance wholly upon the cases of *Adkins* v. *Children's Hospital*, 261 U. S. 525, and *Topeka Laundry Co.* v. *Court of Industrial Relations*, 119 Kan. 12 (fol. 23). The writ was dismissed (fols. 39–42) and the opinion of the Special Term Justice appears in the appendix hereto (p. 43). With the certification that a constitutional question was involved, appeal was taken directly to the highest court of the State, the Court of Appeals, under the provisions of the Civil Practice Act (§ 588) without security (fols. 43–46).

In the lower court and in the Court of Appeals, respondent Tipaldo placed his attack on the validity of the statute on the controlling force of the *Adkins* decision of this court, contending that

the provisions of Chapter 584, Laws of 1933, were violative of the due process clause of the Fourteenth Amendment of the Constitution of the United States. Petitioner herein, respondent in the Court of Appeals, contended that the provisions of the New York statute differ materially from the act under consideration in the *Adkins* case; that the facts conditioning and underlying the New York statute created a situation on the basis of which the New York Minimum Wage Law was valid, and wholly different from those which may have prevailed in the District of Columbia when the District Minimum Wage Law was there enacted in 1918; that the decision in the *Adkins* case was not controlling in the instant proceeding; and that whether the *Adkins* case and the principles therein enunciated be followed or not, Chapter 584, Laws of 1933, of New York State is a valid exercise of the sovereign power of the New York State legislature and does not violate the Fourteenth Amendment of the United States Constitution.

The determination in the Court of Appeals was reached by a divided court, four judges concurring in the majority opinion by the Chief Judge, three dissenting in an opinion by Judge Lehman. The opinions are annexed hereto in the appendix (pp. 52–83). The majority opinion is based upon the grounds that *Adkins* v. *Children's Hospital* (261 U. S. 525) is controlling; that the statutes are not materially different, and that the law is invalid as violating the Constitution of the United States on the authority of the *Adkins* case. The remittitur certifies that the Federal constitutional question necessarily underlies the decision of the Court of Appeals and the opinions bear this out. (Record. Appendix, p. 84.)

Reasons for Allowing This Writ

1. The cause draws into question the due process clause of the Fourteenth Amendment of the Constitution of the United States as the necessary basis of the decision in the case.

2. The Court of Appeals of New York State has based its decision solely on the alleged controlling force of the decision of this court in *Adkins* v. *Children's Hospital*, 261 U. S. 525, which case is clearly distinguishable, on the underlying facts as well as in the statutes under consideration, from the instant case and is not controlling herein.

3. The case of *Adkins* v. *Children's Hospital*, 261 U. S. 525, is not and should not be held to be controlling in the case at bar, where a statute of a State legislature enacted under vitally different underlying conditions, unchallenged, is aimed to eliminate oppressive conditions and promote the welfare of the State.

4. The provisions of Chapter 384, Laws of 1933, of New York, constituting the Minimum Wage Law for Women and Minors in New York State (Labor Law, Art. 19) differ materially in substance and in application from the District of Columbia Act of 1918 (Chap. 174; 40 Stat. 964); the New York statute does not contravene the provisions of the Fourteenth Amendment of the Constitution of the United States or of any other of its articles.

5. The construction and application of the Constitution of the United States and a prior decision of this, the Supreme Court of the United States, are necessarily involved in the case.

6. The circumstances prevailing under which the New York law was enacted call for a reconsideration of the *Adkins* case in the light of the New York act and conditions aimed to be remedied thereby.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the Supreme Court of the State of New York and to the Court of Appeals of the State of New York, commanding the said courts to certify the above cause to this court for review and determination as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this court may be deemed appropriate. A certified copy of the record in the courts below is submitted herewith in support of this petition.

Respectfully submitted,
FREDERICK L. MOREHEAD,
Petitioner,
By
JOHN J. BENNETT, JR.,
Attorney General of the
State of New York,
Attorney for Petitioner,
HENRY EPSTEIN,
Solicitor General, State of New York,
Counsel for Petitioner.

Respondent Tipaldo herein does not oppose the granting of the petition herein for a writ of certiorari.

March ...., 1936.

GATES & LEVITT,
Attorneys for .....

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM 1935

FREDERICK L. MOREHEAD, as the Warden of the City Prison of the Borough of Brooklyn,

Petitioner,

against

PEOPLE EX REL. JOSEPH TIPALDO,

Respondent.

BRIEF IN SUPPORT OF PETITION

(A) Opinions of the courts below.

The opinion rendered in the Supreme Court, Kings County, on the writ of habeas corpus, appears at p. 16 of the record, and is also annexed hereto (p. 43).

The Special Term opinion held the statute valid as proper exercise of the sovereign power of the State in aid of the general welfare of its people. That part of the opinion dealing with an "emergency" was not raised by either party and was conceded not to be an issue. The legislation was not based on any "emergency," but was intended for permanent operation in the fixing of minimum fair wages for women and minors where necessary to prevent "oppressive" wages as defined in the act.

The opinion of the Court of Appeals, as well as the dissenting views are also annexed hereto (pp. 52–83).

The opinion of that court, rendered by the Chief Judge, relies upon the determination of this court in *Adkins* v. *Children's Hospital*, 261 U. S. 525, as controlling its judgment of the case at bar. No material differences are said to be observed by the court in the statutes and the changes in economic factors are not considered by the court in a strict adherence to the decision in the *Adkins* case. The court voids the statute as against the Fourteenth Amendment and asserts the underlying question of the United States Constitution as its ground.

The minority opinion (the decision having been reached by a four to three vote of the judges) distinguishes between the statutes in the *Adkins* and the instant cases; points out the adherence in the New York act to the principles laid down in the *Adkins* case; bases its argument for sustaining the New York Minimum Wage Law on the vital economic factors, unchallenged in record or on briefs, which persuaded the legislature to enact the law; and sustains the law as a valid exercise of the police power of the State for the public good.

(B) Jurisdiction.

The appellate jurisdiction of the Supreme Court of the United States is invoked under Section 237-(b) of the Judicial Code of the United States (28 U. S. C. A. § 344) to correct error of the Court of Appeals of the State of New York in the within cause. In the enforcement of a State statute (Chap. 584, Laws of 1933) respondent was charged with an offense, indicted and arrested. A writ of habeas corpus was sued out, to test the validity of the statute in ques-

tion. In the Supreme Court of the State of New York the writ was dismissed and the statute held valid.

On appeal to the Court of Appeals, the court of last resort, the decision and judgment below were reversed, the writ sustained and the prisoner, respondent herein, discharged. The determination of the Court of Appeals is based upon the application of the provisions of the Fourteenth Amendment of the Constitution of the United States to the statute and relies solely on the decision of this court in *Adkins* v. *Children's Hospital*, 261 U. S. 525.

There is thereby necessarily "drawn in question the validity of a statute" of the State of New York, "on the ground of its being repugnant to the Constitution * * * of * * * the United States." The Federal question is necessarily presented.

Petitioner contends that the provisions of Chapter 584, Laws of New York, 1933, are not repugnant to the Constitution of the United States.

(C) Facts.

The facts are set forth at pages 5–7 hereof. They are not disputed.

(D) Assignments of Error.

1. The Court of Appeals erred in holding that the New York State Minimum Wage Law (Chap. 584, Laws 1933) did not differ materially from the Act of Congress ruled upon in *Adkins* v. *Children's Hospital* (261 U. S. 525) and constitutes "an unconstitutional interference with the liberty of contract."

2. The Court of Appeals erred in holding that the principles and ruling of the *Adkins* case are applicable to and controlling in the instant statute and case, in that it held

(a) The distinction between this case and the *Adkins* case is merely a difference in details, methods and time, and not a substantial difference in theory and practice, and

(b) What was vague in the statute under consideration "has not been made any clearer" in the instant case.

3. The Court of Appeals erred in holding that the changes in economic conditions of women in industry in New York State shown to have taken place in the last decade or more and declared by the legislature as the basis for enacting the New York Minimum Wage Law for women and minors, and unchallenged herein, were not sufficient to validate the statute under the Constitution of the United States, despite the acceptance of the principles of the *Adkins* case.

4. The Court of Appeals erred in rejecting the thesis that the exceptional circumstances and conditions shown to exist in respect of women in industrial employment in New York State justified such restraint upon the freedom of contract as is embodied in the New York State law herein considered.

5. The Court of Appeals erred in holding that this law (Chap. 584, Laws of 1933) in prohibiting the payment of an "oppressive wage", both lower than the fair value of the services rendered and also less than sufficient to maintain health sub-

sistence, constitutes an unreasonable restraint upon freedom of contract under the Constitution of the United States.

6. The Court of Appeals erred in holding that Chapter 584, Laws of 1933 of New York State, violates the provisions of the Fourteenth Amendment of the Constitution of the United States in that it held

(a) The operation of the said statute deprived the respondent Tipaldo of his liberty withouf due process of law, and

(b) The enactment of the said statute was not a reasonable exercise of the sovereign power of the legislature of the State of New York in the interest of the health and welfare of its citizens.

(E) Summary of Argument.

(1) The case of *Adkins* v. *Children's Hospital*, 261 U. S. 525, and the statute therein held invalid, are clearly distinguishable from and not controlling in consideration of the instant case and the New York Minimum Wage Law herein.

(a) The decision of this court in the *Adkins* case is not controlling and not applicable to the facts or law in the instant case.

(b) The underlying facts are different and the statutes different in substance.

(2) The determination of the legislature of New York State as to the necessity of public welfare and the appropriateness of the remedial measures adopted is presumptively valid. The burden of showing the palpable invalidity of the remedy adopted has not been met by respondent herein.

(a) Legislative findings;

(b) Facts establish the reasonable ground for said findings;

(c) None such facts are challenged;

(d) Sole reliance is placed upon the decision of this court in the *Adkins* case.

(3) The New York Minimum Wage Law for Women and Minors is a valid exercise of the sovereign power of the legislature of the State.

(a) The law is legitimate in the public purpose sought to be attained and reasonable in the method used to achieve the purpose.

(b) The health of women in industry, where exploitation has resulted from lack of equality in bargaining power and other factors, is a matter of legislative concern.

(c) Fixing of wages in industry is permitted by the courts in proper cases.

I.

The case of Adkins v. Children's Hospital, 261 U. S. 525, and the act of Congress (40 Stat. 964, Chap. 174) there before this court differ materially and are clearly distinguishable from the instant case and the New York State Minimum Wage Law (Chap. 584, Laws 1933).

(a) The Statutes.

1. The District of Columbia Act, attacked in the *Adkins* case, was aimed to provide women and minors in industry with wages adequate to maintain decent standards of living (§ 23). Its sole standard was the vague and variable "cost of living". The New York Act provides as the basis for the wage the "fair value" of the services rendered in each separate industry where applied. (§ 551-8)

2. In the *Adkins* case the statute might require an employer to pay *more* than the value of the services. The New York act can only require the payment of the value of the services at the very most.

3. In the *Adkins* case the statute applied a formula having no relationship to the actual value of the services. The New York act defines the minimum wage as one "fairly and reasonably commensurate with the value of the service or class of service rendered". (§ 551-8)

4. The District of Columbia statute applied to all occupations with an identical standard for all. The New York act applies only to individual industries in which inquiry discloses the evil of an "oppressive wage" to be present. (§ 551-7; § 552).

5. The New York act provides a nine months' probationary period before the wage set by the Wage Board may be mandatory. Public hearings, opportunity for modification to meet changing costs and conditions are provided (§§ 555–562). The full review provided in the Labor Law, Article 3, is permitted. That provision of the Labor Law was sustained in this court.

Matter of *Helfrick* v. *Dahlstrom Metallic Door Co.*, 256 N. Y. 199; *284* U. S. *594*

(b) The Underlying Facts.

1. Social, economic, and industrial conditions in New York State vary greatly from those prevailing in the urban area of the District of Columbia. In the District of Columbia there were affected *in total* some 17,000 female and minor workers in the very restricted businesses, largely retail concerns, clerical and hotel services; in contrast with which there are engaged in industry in New York State some 1,500,000 women alone, approximately 15 per cent of the State's entire population.[1]

In the laundry industry itself, in which this case arose, there are some 22,000 women employed. These are concentrated in urban centers and represent wage levels ranging from substantial numbers under five dollars per week, to more than ninety per cent receiving under fifteen dollars per week. In all the industries employing women in New York State, in the period from 1913–1934, a very

[1] Taken from U. S. Census—See Appendix, Tables I and II, factual material.

substantial number earned less than ten dollars per week and a considerable number under five dollars per week. The week was normally one of at least forty hours.[2]

2. In the State of New York from 1900 to 1930 the number of females over ten years of age engaged in industry increased from 672,045 to 1,415,105.[3]

3. In the State of New York from 1890 to 1930 the number of married women over fifteen years of age employed in industry increased from 42,968 to 328,460, or from almost 4 per cent to about 12 per cent of all married women in those age limits.[4] Seventy-two per cent of these live with families of two or more members.[5]

4. Women's earnings compared with men's for identical tasks, and compared with other women's for identical tasks, in identical industries, show such wide variations as to indicate no true relationship to the fair value of services rendered.

(Charts and Tables, pp. 21–30 Factual Material.)

5. Efforts of groups of employees to remedy "oppressive wage" conditions have proved fruitless without governmental aid. The major industrial plants in the laundry industry supported the position of the State in the Court of Appeals.*

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[2] N. Y. Dept. of Labor Reports—See Appendix, Tables X, XI, factual material.

[3] U. S. Census 1930—See Chart I, factual material—p. 2.

[4] U. S. Census 1930—See Chart II, p. 6, Appendix, Table V, factual material.

[5] U. S. Dept. of Commerce—Census Monograph, pp. 122–156.

* Dissenting opinion and Brief Amicus Curiae of *Interborough Coat and Apron Ass'n* and *Towel and Napkin Launderers, Assoc.* in Court of Appeals.

6. Other vital considerations vary. (See factual material.)

Facts and circumstances condition legislation and govern the determination of constitutional validity.

O'Gorman & Young v. *Hartford Ins. Co.*, 282 U. S. 251
Bunting v. *Oregon*, 243 U. S. 426
Radice v. *New York*, 264 U. S. 292
Nebbia v. *New York*, 291 U. S. 502
Borden's Co. v. *Ten Eyck*, decided Jan. 1936 (U. S. Supreme Court).

(c) The opinion of the Court in Adkins v. Children's Hospital, 261 U. S. 525.

(1) "*The moral requirement implicit in every contract of employment, viz: that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored.*"

The New York statute prescribes as the very basis of the wage the fair value of the services rendered, supplying the answer to this very pertinent objection.

(2) "*A statute requiring an employer * * * to pay the value of the services rendered * * * would be understandable.*"

The New York statute prescribes the very standard here indicated by the court.

The use of the "minimum cost of living necessary for health" (§§ 551–7) in the act is only in defining an "oppressive and unreasonable wage" and not in defining the "fair wage," which is "a wage fairly and reasonably commensurate with

the value of the service or class of service rendered" (§§ 551–8). It is the "oppressive" wage which is prohibited and the "fair wage" which is set as a minimum. Thus the cost of living element does *not* enter into the "fair wage" determination, based solely on value of services. The "cost of living" for health maintenance is *at most* a check "downward," a barometric reading in the calculus of the wage system to ascertain where there *may* exist an "oppressive" wage. There was no such basis, nor any such definition in the statute at bar in the *Adkins* case.

(3) The statutes and decisions discussed in the *Adkins* case placing restraints on frauds and unfair methods in wage payments, etc., are applicable here. No constitutional rights exist to cheat and exploit another by reason of a more potent economic position.

Holden v. *Hardy,* 169 U. S. 366
McLean v. *Arkansas,* 211 U. S. 539
Radice v. *New York,* 264 U. S. 292
Chicago, etc. R. R. v. *Wellman,* 143 U. S. 339–346
Highland v. *Russell Car Co.,* 279 U. S. 253–262.

(4) *"No real test of the economic value of the law can be had during periods of maximum employment, * * *; that will come in periods of depression * * *."*

That period, the time for evaluation of the minimum wage law, as indicated by this court, has now come. Wage levels were raised

to a fair return for the services and without reducing others to the minimum (Factual Background—VI—pp. 63–79). The cases cited as being "somewhat similar" to this statute by the opinion of the Court of Appeals herein, and which followed the *Adkins* case, were all based on the identical standard of the *Adkins* case and not like the statute of New York here before this court. The *Adkins* case is, therefore, not controlling in the instant case and this court should review the decision of the Court of Appeals to establish that fact. *Each case of a State statute tested under the Fourteenth Amendment presents an individual instance in which the variance in facts must be considered as bearing upon the applicability of other decided cases.*

Muller v. *Oregon*, 208 U. S. 412–420, 421
Nebbia v. *New York*, 291 U. S. 502
Jacobson v. *Massachusetts*, 197 U. S. 11.

(d) Thus not only are the cases and statutes distinguished, but even accepting the principles of the *Adkins* case, the present statute and the conditions shown to prevail in New York State meet every requirement of and avoid the objectionable features pointed out as the basis for the decision in the *Adkins* case.

II.

The determination by statute of the Legislature of New York State as to the necessity for and appropriateness of the measures adopted to provide for the public welfare is presumptively valid; the burden of establishing the invalidity of the remedy under the Fourteenth Amendment has not been met by respondent herein.

(a) The legislative Findings set forth in § 550 of the New York Minimum Wage Law, and amply substantiated by the evidence from recognized and official sources (Factual Brief) pertinent to New York State alone, establish the reasonableness of the remedy beyond doubt. These findings and the facts supporting them are unquestioned and unchallenged by respondent herein.

> 1. "We have not taken issue with the factual recitals in the act."
>
> (Appellant Tipaldo's Reply Brief in Court Appeals.)
>
> 2. "The appellant does not challenge these findings of fact by the legislature, nor does he challenge the statements in the 'Factual Brief' submitted by the respondent to sustain and amplify these findings."
>
> (See opinion of Lehman, J.)

(b) Reliance below upon argument and in briefs was placed wholly on *Adkins* v. *Children's Hospital*, 261 U. S. 525.

The varying conditions and changed circumstances, as well as the statutory differences, were not considered as valid considerations, despite repeated decisions of this court to the contrary.

(c) In the face of established vitally different conditions, changed circumstances,—a different statute, or even a like statute, is entitled to reconsideration in the applicability of the Fourteenth Amendment.

Bloch v. *Hirsch*, 256 U. S. 135
Hurtado v. *California*, 110 U. S. 516
Holden v. *Hardy*, 169 U. S. 366
Chastleton Corp. v. *Sinclair*, 264 U. S. 543
Abie State Bank v. *Bryan*, 282 U. S. 765.

(d) The burden of meeting these facts and showing the act to be palpably in excess of legislative power was not met in the instant case.

Missouri Pac. R. R. v. *Norwood*, 283 U. S. 249
Borden's Farm Products v. *Baldwin*, 293 U. S. 194.

Failing this, the validity of the statute under the Fourteenth Amendment should have been sustained. No patent invalidity on the face of the statute is apparent.

III.

The New York Minimum Wage Law for women and minors is a valid exercise of the sovereign police power of the Legislature of New York State.

(a) The purpose is legitimate. It is for the promotion of the public welfare and protection of women from oppressive wages and exploitation (§ 550).

Adkins v. *Children's Hospital* (*supra*).

(b) The method is reasonable and the standard definite and related to the relationship of employer and employee.

The fair minimum wage must be on a *quantum meruit*, or value of service basis (§ 551, sbd. 8). The inquiry is directed by a wage board representing all interested parties; is based on evidence from wide sources *in the industry affected;* is subjected to public hearings; to a probationary period of nine months before the order becomes mandatory; is subject to modification on showing of changed conditions within the industry affected; is related to the specific industries in which the evils sought to be remedied appear (§§ 553-563). Review of a full and reasonable nature is provided for by the Industrial Board and the courts under Article 3 of the Labor Law (§ 563). The discretion of the Wage Board is clearly prescribed and its limits sharply defined (§ 555, subds. 1-6; §§ 556, 557).

(c) Such limited and reasonable infringement upon the freedom of contract in the interest of the general welfare, for a proper public purpose, does not contravene the Fourteenth Amendment.

Nebbia v. *People*, 291 U. S. 502.
McLean v. *Arkansas*, 211 U. S. 539.
McCulloch v. *Maryland*, 4 Wheat. 316–431.

The quantum of reasonableness is the determining factor.

Mugler v. *Kansas*, 123 U. S. 623.
Atkin v. *Kansas*, 191 U. S. 207–223.
O'Gorman & Young v. *Hartford*, 282 U. S. 251, 257, 258.

(d) The assurance of fair wages between employees and employer; the fixing of prices under certain fitting circumstances; the elimination of sources of unfair competition and unfair advantages, have all been recognized by this court as proper legislative restrictions upon liberty of contract.

Texas etc. R. R. v. *Railway Clerks,* 281 U. S. 548.
Central Lumber Co. v. *South Dakota,* 226 U. S. 157.
Radice v. *New York,* 264 U. S. 292.
Riley v. *Massachusetts,* 232 U. S. 671.
German Alliance Ins. Co. v. *Lewis,* 233 U. S. 389–417.
Holden v. *Hardy,* 169 U. S. 366.
N. Y. Central & H. R. R. v. *Williams,* 199 N. Y. 108.
Griffith v. *Connecticut,* 218 U. S. 563.
Stettler v. *O'Hara,* 243 U. S. 629.

To paraphrase the language of Mr. Justice Butler in *Highland* v. *Russell Car etc. Co.,* 279 U. S. 253–262, the New York Minimum Wage Law merely deprives the employer of the right or opportunity by negotiation to pay less than the fair value of the services rendered.

CONCLUSION

The time for the evaluation of a State Minimum Wage Law has definitely arrived. The New York State Minimum Wage Law (Chap. 584, Laws 1933) contains none of the provisions condemned by the Supreme Court in the *Adkins* case. It further contains the very provisions

safeguarding the interest of the employees suggested by the prevailing opinion in that case. It constitutes a valid exercise of the sovereign power of the New York legislature in the interest of public welfare. It contravenes no provision of the Constitution of the United States.

The writ of certiorari herein prayed for should be granted.

Respectfully submitted,

JOHN J. BENNETT, JR.,

Attorney General of the State of New York,
Attorney for Petitioner,

HENRY EPSTEIN,

Solicitor General, State of New York,
Counsel.

APPENDIX A

LAWS OF NEW YORK—By Authority

CHAPTER 584

AN ACT to amend the labor law, in relation to the determination and establishment of minimum fair wage standards for women and minors, with provision for the imposition of penalties for the violation thereof.

Became a law April 29, 1933, with the approval of the Governor. Passed, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter fifty of the laws of nineteen hundred twenty-one, entitled "An act in relation to labor, constituting chapter thirty-one of the consolidated laws," is hereby amended by inserting therein a new article, to be article nineteen, to read as follows:

ARTICLE 19

Minimum Fair Wage Standards for Women and Minors

Section 550. Factual background.
551. Definitions.
552. Contracts of employment void as against public policy.
553. Investigatory powers.
554. Power and duty of commissioner to appoint wage board.
555. Constitution of wage board.
556. Report of wage board.
557. Action of the commissioner on report of wage board.
558. Special licenses.
559. Publicity.
560. Commissioner's power to make orders mandatory.
561. Reconsideration of wage orders.

562. Reconsideration of administrative regulations.
563. Right of review.
564. Records and notices required of employers.
565. Penalties.
566. Recovery of wages.
567. Construction.

Section 550.* The employment of women and minors in trade and industry in the state of New York at wages unreasonably low and not fairly commensurate with the value of the services rendered is a matter of grave and vital public concern. Many women and minors employed for gain in the state of New York are not as a class upon a level of equality in bargaining with their employers in regard to minimum fair wage standards, and "freedom of contract" as applied to their relations with their employers is illusory. Since a very large percentage of such workers are obliged from their week to week wages to support themselves and others who are dependent upon them in whole or in part they are, by reason of their necessitous circumstances, forced to accept whatever wages are offered them. Judged by any reasonable standard, wages are in many cases fixed by chance and caprice and the wages accepted are often found to bear no relation to the fair value of the service rendered. Women and minors employed for gain are peculiarly subject to the overreaching of inefficient, harsh or ignorant employers and under unregulated competition where no adequate machinery exists for the effective regulation and maintenance of minimum fair wage

* So in original. [Section heading omitted.]

standards, the standards such as exist tend to be set by the least conscionable employers. In the absence of any effective minimum fair wage rates for women and minors, the constant lowering of wages by unscrupulous employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers and threatens the stability of industry. The evils of oppressive, unreasonable and unfair wages as they affect women and minors employed in the state of New York are such as to render imperative the exercise of the police power of the state for the protection of industry and of the women and minors employed therein and of the public interest of the community at large in their health and well-being and in the prevention of the deterioration of the race. In the considered judgment of the legislature this article is constitutional.

§ 551. Definitions. As used in this article:

1. "Commissioner" shall mean the industrial commissioner.

2. "Director" shall mean the director or any deputy director of the minimum wage division, which shall be set up as a separate division in the department of labor by the commissioner with a director in charge and with such deputy directors and other assistants and employees as the commissioner may deem desirable.

3. "Wage board" shall mean a board created as provided in section five hundred and fifty-five of the article.

4. "Woman" shall mean a female of twenty-one years or over.

5. "Minor" shall mean a person of either sex under the age of twenty-one years.

6. "Occupation" shall mean an industry, trade or business or branch thereof or class of work therein in which women or minors are gainfully employed, but shall not include domestic service in the home of the employer or labor on a farm.

7. "An oppressive and unreasonable wage" shall mean a wage which is both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health.

8. "A fair wage" shall mean a wage fairly and reasonably commensurate with the value of the service or class of service rendered. In establishing a minimum fair wage for any service or class of service under this article the commissioner and the wage board without being bound by any technical rules of evidence or procedure (1) may take into account all relevant circumstances affecting the value of the service or class of service rendered, and (2) may be guided by like considerations as would guide a court in a suit for the reasonable value of services rendered where services are rendered at the request of an employer without contract as to the amount of the wage to be paid, and (3) may consider the wages paid in the state for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards.

9. "A directory order" shall mean an order the non-observance of which may be published as provided in section five hundred and fifty-nine of this article.

10. "A mandatory order" shall mean an order the violation of which shall be subject to the penalties prescribed in paragraph two of section five hundred and sixty-five of this article.

§ 552.* It is hereby declared to be against public policy for any employer to employ any woman or minor in an occupation in this state at an oppressive and unreasonable wage as defined in section five hundred and fifty-one of the article and any contract, agreement or understanding for or in relation to such employment shall be null and void.

§ 553.* The commissioner or the director or any authorized representative of the director shall have full power and authority:

1. To investigate and ascertain the wages of women and minors employed in any occupation in the state;

2. To enter the place of business or employment of any employer of women and minors in any occupation for the purpose of examining and inspecting any and all books, registers, payrolls, and other records of any employer of women or minors that in any way appertain to or have a bearing upon the question of wages of any such women or minors and for the purpose of ascertaining whether the orders of the commissioner have been and are being complied with; and

3. To require from such employer full and correct statements in writing when the commissioner or the director or any authorized representative of the director deems necessary, of the wages paid to all women and minors in his employment.

* So in original. [Section heading omitted.]

§ 554.* The commissioner or the director shall have the power, and it shall be the duty of the commissioner on the petition of fifty or more residents of the state, to cause an investigation to be made by the director or any authorized representative of the director, of the wages being paid to women or minors in any occupation to ascertain whether any substantial number of women or minors in such occupation are receiving oppressive and unreasonable wages as defined in section five hundred and fifty-one. If, on the basis of information in the possession of the commissioner or the director, with or without a special investigation, the commissioner is of the opinion that any substantial number of women or minors in any occupation or occupations are receiving oppressive and unreasonable wages as defined in section five hundred and fifty-one, he shall appoint a wage board to report upon the establishment of minimum fair wage rates for such women or minors in such occupation or occupations.

§ 555.* 1. A wage board shall be composed of not more than three representatives of the employers in any occupation or occupations, an equal number of representatives of the employees in such occupation or occupations and of not more than three disinterested persons representing the public, one of whom shall be designated as chairman. The commissioner after conferring with the director shall appoint the members of such wage board, the representatives of the employers and employees to be selected so far as practicable from nominations submitted by employers and employees in such occupation or occupations. Two-thirds

* So in original. [Section heading omitted.]

of the members of such wage board shall constitute a quorum and the recommendations or report of such wage board shall require a vote of not less than a majority of all its members. Members of a wage board shall serve without pay, but may be reimbursed for all necessary traveling expenses. The commissioner after conferring with the director shall make and establish from time to time rules and regulations governing the selection of a wage board and its mode of procedure not inconsistent with this article.

2. A wage board shall have power to administer oaths and to require by subpoena the attendance and testimony of witnesses, the production of all books, records, and other evidence relative to any matters under investigation. Such subpoenas shall be signed and issued by a member of the wage board and shall be served and have the same effect as if issued out of the supreme court. A wage board shall have power to cause depositions of witnesses residing within or without the state to be taken in the manner prescribed for like depositions in civil actions in the supreme court.

3. The commissioner or the director shall present to a wage board promptly upon its organization all the evidence and information in the possession of the commissioner or director relating to the wages of women and minor workers in the occupation or occupations for which the wage board was appointed and all other information which the commissioner or the director deems relevant to the establishment of a minimum fair wage for such women and minors, and shall cause to be brought before the committee any witnesses whom the commissioner or the director deems material.

A wage board may summon other witnesses or call upon the commissioner or the director to furnish additional information to aid it in its deliberation.

4. Within sixty days of its organization a wage board shall submit a report including its recommendations as to minimum fair wage standards for the women or minors in the occupation or occupations the wage standards of which the wage board was appointed to investigate. If its report is not submitted within such time the commissioner may constitute a new wage board.

5. A wage board may differentiate and classify employments in any occupation according to the nature of the service rendered and recommend appropriate minimum fair rates for different employments. A wage board may also recommend minimum fair wage rates varying with localities if in the judgment of the wage board conditions make such local differentiation proper and do not effect an unreasonable discrimination against any locality.

6. A wage board may recommend a suitable scale of rates for learners and apprentices in any occupation or occupations, which scale of learners' and apprentices' rates may be less than the regular minimum fair wage rates recommended for experienced women or minor workers in such occupation or occupations.

§ 556.* A report from a wage board shall be submitted to the commissioner who shall within ten days confer with the director and accept or reject such report. If the report is rejected the commissioner shall resubmit the matter to the same wage board or to a new wage board with a

* So in original. [Section heading omitted.]

statement of the reasons for the resubmission. If the report is accepted it shall be published together with such proposed administrative regulations as the commissioner after conferring with the director may deem appropriate to implement the report of the wage board and to safeguard the minimum fair wage standards to be established, and notice shall be given of a public hearing to be held by the commissioner or the director not sooner than fifteen nor more than thirty days after such publication at which all persons in favor of or opposed to the recommendations contained in such report or in such proposed regulations may be heard.

§ 557.* Within ten days after such hearing the commissioner shall confer with the director and approve or disapprove the report of the wage board. If the report is disapproved the commissioner may resubmit the matter to the same wage board or to a new wage board. If the report is approved the commissioner shall make a directory order which shall define minimum fair wage rates in the occupation or occupations as recommended in the report of the wage board and which shall include such proposed administrative regulations as the commissioner may deem appropriate to implement the report of the wage board and to safeguard the minimum fair wage standards established. Such administrative regulations may include among other things, regulations defining and governing learners and apprentices, their rates, number, proportion or length of service, piece rates or their relation to time rates, overtime or part-time rates, bonuses or special pay for

* So in original. [Section heading omitted.]

special or extra work, deductions for board, lodging, apparel or other items or services supplied by the employer, and other special conditions or circumstances; and in view of the diversities and complexities of different occupations and the dangers of evasion and nullification, the commissioner may provide in such regulations without departing from the basic minimum rates recommended by the wage board such modifications or reductions of or addition to such rates in or for such special cases or classes of cases as those herein enumerated as the commissioner may find appropriate to safeguard the basic minimum rates established.

§ 558. For any occupation for which minimum fair wage rates have been established the commissioner or the director may cause to be issued to a woman or minor, including a learner or apprentice, whose earning capacity is impaired by age or physical or mental deficiency or injury, a special license authorizing employment at such wages less than such minimum fair wage rates and for such period of time as shall be fixed by the commissioner or the director and stated in the license.

§ 559.* If the commissioner or the director or any authorized representative of the director has reason to believe that any employer is not observing the provisions of any order made by him under section five hundred and fifty-seven of this article, the commissioner or the director may, on fifteen days' notice summon such employer to appear before the commissioner or the director to show cause why the name of such employer should not be published as having failed to observe the provisions of such order. After such hearing and the

* So in original. [Section heading omitted.]

finding by the commissioner or the director of non-observance, the commissioner may cause to be published in a newspaper or newspapers circulating within the state of New York or in such other manner as the commissioner may deem appropriate, the name of any such employer or employers as having failed in the respects stated to observe the provisions of the directory order of the commissioner. Neither the commissioner nor any authorized representative of the commissioner, nor any newspaper publisher, proprietor, editor, nor employee thereof shall be liable to an action for damages for publishing the name of any employer as provided for in ~~this~~ article, unless guilty of some wilful misrepresentation.

§ 560.* If at any time after a directory minimum fair wage order has been in effect for nine months the commissioner is of the opinion after conferring with the director that the persistent non-observance of such order by one or more employers is a threat to the maintenance of fair minimum wage standards in any occupation or occupations the commissioner or the director may give notice of the intention of the commissioner to make such order mandatory and of a public hearing to be held not sooner than fifteen nor more than thirty days after such publication at which all persons in favor of or opposed to a mandatory order may be heard by the commissioner or the director. After such hearing the commissioner, if he adheres to his opinion, may make the previous directory order or any part thereof mandatory and so publish it.

§ 561.* At any time after a minimum fair wage order has been in effect for one year or more,

* So in original. [Section heading omitted.]

whether during such period it has been directory or mandatory, the commissioner may on his own motion after conferring with the director and shall on petition of fifty or more residents of the state reconsider the minimum fair wage rates set therein and reconvene the same wage board or appoint a new wage board to recommend whether or not the rate or rates contained in such order should be modified. The report of such wage board shall be dealt with in the manner prescribed in sections five hundred and fifty-six and five hundred and fifty-seven of this article provided that if the order under reconsideration has theretofore been made mandatory in whole or in part by the commissioner under section five hundred and sixty then the commissioner in making any new order or confirming any old order shall have power to declare to what extent such order shall be directory and to what extent mandatory.

§ 562.* The commissioner may at any time and from time to time after conference with the director propose such modifications of or additions to any administrative regulations included in any directory or mandatory order of the commissioner without reference to a wage board, as the commissioner may deem appropriate to effectuate the purposes of this article, provided such proposed modifications or additions could legally have been included in the original order, and notice shall be given of a public hearing to be held by the commissioner or director not less than fifteen days after such publication at which all persons in favor of or opposed to such proposed modification or additions may be heard. After such hear-

* So in original. [Section heading omitted.]

ing the commissioner may make an order putting into effect such proposed modification of or additions to the administrative regulations as he deems appropriate, and if the order of which the administrative regulations form a part has theretofore been made mandatory in whole or in part by the commissioner under section five hundred and sixty, then the commissioner in making any new order shall have the power to declare to what extent such order shall be directory and to what extent mandatory.

§ 563.* All questions of fact arising under this act except as otherwise herein provided shall be decided by the commissioner or the director and there shall be no appeal from the decision of the commissioner or the director on any such question of fact, but there shall be a right of review by the industrial board and the courts as provided in article three of the labor law from any ruling or holding on a question of law included or embodied in any decision or order of the commissioner or the director.

§ 564.* Every employer of women and minor workers shall keep a true and accurate record of the hours worked by each and the wages paid by him to each and shall furnish to the commissioner or the director or the authorized representative of the director upon demand a sworn statement of the same. Such records shall be open to inspection by the commissioner or the director or any authorized representative of the director at any reasonable time. Every employer subject to a minimum fair wage order whether directory or

* So in original. [Section heading omitted.]

mandatory shall keep a copy of such order posted in a conspicuous place in every room in which women or minors are employed. Employers shall be furnished copies of orders on request without charge.

§ 565.* 1. Any employer and his agent, or the officer or agent of any corporation, who discharges or in any other manner discriminates against any employee because such employee has served or is about to serve on a wage board or has testified or is about to testify before any wage board or in any other investigation or proceeding under or related to this article or because such employer believes that said employee may serve on any wage board or may testify before any wage board or in any investigation or proceeding under this article shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than fifty nor more than two hundred dollars.

2. Any employer or the officer or agent of any corporation who pays or agrees to pay to any woman or minor employee less than the rates applicable to such woman or minor under a mandatory minimum fair wage order shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than fifty nor more than two hundred dollars or by imprisonment of not less than ten nor more than ninety days or by both such fine and imprisonment, and each week in any day of which such employee is paid less than the rate applicable to him under a mandatory minimum fair wage order and each employee so paid less shall constitute a separate offense.

* So in original. [Section heading omitted.]

3. Any employer or the officer or agent of any corporation who fails to keep the records required under this article or to furnish such records to the commissioner or the director or any authorized representative of the director upon request shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than twenty-five nor more than one hundred dollars, and each day of such failure to keep the records requested under this article or to furnish same to the commissioner or the director or any authorized representative of the director shall constitute a separate offense.

§ 566.* If any woman or minor worker is paid by his employer less than the minimum fair wage to which he is entitled under or by virtue of a mandatory minimum fair wage order he may recover in a civil action the full amount of such minimum wage less any amount actually paid to him by the employer together with costs and such reasonable attorney's fees as may be allowed by the court, and any agreement between him and his employer to work for less than such mandatory minimum fair wage shall be no defense to such action. At the request of any woman or minor worker paid less than the minimum wage to which he was entitled under a mandatory order the commissioner may take an assignment of such wage claim in trust for the assigning employee and may bring any legal action necessary to collect such claim, and the employer shall be required to pay the costs and such reasonable attorney's fees as may be allowed by the court.

* So in original. [Section heading omitted.]

§ 567.* If any provisions of this article or the application thereof to any person or circumstance, is held invalid the remainder of the article and the application of such provision to other persons or circumstances shall not be affected thereby.

§ 2. This act shall take effect immediately.

STATE OF NEW YORK,
Department of State. } ss:

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

EDWARD J. FLYNN
Secretary of State

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* So in original. [Section heading omitted.]

APPENDIX B

(1) Opinion of Supreme Court at Special Term—on Return of Writ of Habeas Corpus

By Mr. Justice May

People ex rel. Tipaldo v. *Morehead*—This is a proceeding by habeas corpus instituted by the relator to test the validity of a new article added to the Labor Law known as article 19, passed by the Legislature in 1933 and entitled "Minimum Fair Wage for Women and Children." The relator is imprisoned under an indictment which charges in substance that he, as manager of a laundry in Brooklyn, paid adult women employees a lesser sum than the minimum wage fixed for that class of employees by the Industrial Commissioner pursuant to the provisions of the act. He asserts that the statute contravenes the 14th Amendment of the Federal Constitution and article 1, section 6, of the Constitution of the State of New York, in that it operates to deprive him of liberty and property without due process of law, and also operates to compel him to be a witness against himself in a criminal case.

Section 550, the first section of the new article, recites the factual situation which, in the opinion of the Legislature, justified the enactment as a valid exercise of the police power. These recitals are in substance as follows: That the employment of women and minors in trade and industry in this state at wages unreasonably low and not fairly commensurate with the value of the services rendered is a matter of "grave and vital concern"; that many women and minors so employed are not as a class upon a level of equality in bargaining with their employers in regard to "minimum fair wage standards," and

"freedom of contract" as applied to their relations with their employers is illusory; that since a very large percentage of such workers are obliged to support themselves and others from their weekly wages they are by reason of their "necessitous circumstances" forced to accept whatever wages are offered them; that judged by any reasonable standard wages in many cases are fixed by "chance and caprice" and bear no relation to the fair value of the services rendered. The remaining portion of the section reads as follows: "* * * Women and minors employed for gain are peculiarly subject to the overreaching of inefficient, harsh or ignorant employers and under unregulated competition, where no adequate machinery exists for the effective regulation and maintenance of minimum fair wage standards, the standards such as exist tend to be set by the least conscionable employers. In the absence of any effective minimum fair wage rates for women and minors, the constant lowering of wages by unscrupulous employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers and threatens the stability of industry. The evils of oppressive, unreasonable and unfair wages as they affect women and minors employed in the state of New York are such as to render imperative the exercise of the police power of the state for the protection of industry and of the women and minors employed therein and of the public interest of the community at large in their health and well-being and in the prevention of the deterioration of the race. In the considered judgment of the Legislature this article is constitutional."

The statute defines an "oppressive and unreasonable wage" and a "fair wage," and section 552 declares it to be against public policy to employ any woman or minor in an occupation in this state at an oppressive and unreasonable wage as defined by the foregoing provisions. By other provisions there is set up a comprehensive scheme with adequate machinery to carry into effect the purpose of the act.

The underlying thought of relator's contention appears to be that the right of freedom of contract emanates from the Fifth Amendment to the United States Constitution, which provides that no person shall be deprived of life, liberty or property without due process of law; and consequently that the minimum wage law here under consideration, in that it deprives an adult woman in full possession of her normal faculties of the right freely to contract with reference to her services, violates the similar inhibition upon states found in the due process clause of the Fourteenth Amendment.

In support of his contention relator relies principally upon the case of *Adkins* v. *Children's Hospital* (261 U. S. 525). In that case the court decreed the unconstitutionality of an act fixing the minimum wages for women and children in the District of Columbia. The court there asserted that it was no longer open to question that the right to contract with reference to one's affairs is a part of the liberty of the individual which is protected by the due process clause of the Fifth Amendment, that included in the right of personal liberty and private property is the right to contract for the acquisition of property, and

that chief among such contracts is that of personal employment whereby labor and other services are exchanged for money or other forms of property. After reference to decisions sustaining the validity of statutes relating to businesses "impressed with a public interest" and to decisions relating to statutes limiting the hours of labor in certain industries including the case of *Muller* v. *Oregon* (208 U. S. 412), the court wrote as follows: "* * * But the ancient inequality of the sexes, otherwise than physical, as suggested in the *Muller* case (p. 421) has continued 'with diminishing intensity.' In view of the great—not to say revolutionary changes which have taken place since that utterance in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite to the vanishing point. In this aspect of the matter, while the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships.

Notwithstanding the force and cogency of this reasoning, this court is not prepared to assert that the *Adkins* case is an authority which impellingly necessitates an adjudication of the invalidity of the statute here involved. It is of special significance that in the *Adkins* case, with reference to the conception of liberty as involved in the words "right of contract" the court wrote: "An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, *unless it be supportable as a reasonable exercise of the police power of the State*". (Italics ours.) And again with reference to freedom of contract the court wrote: "There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; *and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances* * * *" (Italics ours).

Here is a distinct and unequivocal pronouncement that a reasonable exercise of the police power may work an interference with liberty of contract that is not necessarily to be deemed arbitrary, and that an abridgement of that right may be justified by "exceptional circumstances."

The primary question here involved is whether, within the purview of the principles thus enunciated, the interference with the right to contract effected by the minimum wage law may be justified as an exercise of the police power, reasonable because justified by existing conditions, or to state it otherwise, whether the abridgement of

freedom of contract may be sanctioned "by the existence of exceptional circumstances" within the rule above stated.

An attempt to exhaustively review the substance of oral and written characterizations of the effect of the world-wide depression would serve no useful purpose. The court may take judicial notice that almost without warning it came upon mankind with an unforeseen and irresistible onrush that bound and fettered the world in its devastating grip. Business collapsed, our conceptions of economic and social securities were shattered, peace of mind was transformed into dread apprehension, contentment into unrest, comfort gave way to hardship and sufficiency to privation. As a result of this universal catastrophe, thousands of women reared to a life of ease, maintained in comfortable surroundings, inexperienced with the hardship of poverty, with no occupational training and with no business experience, suddenly found themselves engulfed in the whirlpool of industrial strife, forced there by a calamity of hitherto unknown magnitude, compelled to there engage in a merciless and to them unfamiliar competition.

Do the dictates of reason and the common experience of mankind impel the conclusion that under these conditions these women are on a parity with men in their ability to distinguish between legitimate and unscrupulous business practices, between the honest and dishonest employer, between fair dealing and chicanery, between "an oppressive and unreasonable wage" and a "fair wage" as defined in the act? The Legislature has answered the inquiry in the negative as evidenced

by the last sentence in section 550, which reads: "In the considered judgment of the Legislature this article is constitutional".

This declaration, unusual in a statute, indicates a legislative familiarity with the decisions of the higher courts with reference to legislation of this general character and amounts to a pronouncement that in the Legislature's opinion, the act in so far as it interferes with liberty of contract, is justified as a reasonable exercise of the police power by the existence of these "exceptional circumstances".

The act evidences a humane legislative intent to ameliorate human distress by affording a measure of security to women, who by reason of unprecedented adverse conditions existing at the time, were unable to adequately protect themselves in an industrial life, in which, as compared with men, they were at a disadvantage. Thus its ultimate purpose was to protect women from unscrupulous employers though the medium of a compulsory wage reasonably commensurate with the services rendered, and also to protect industry from evils which are frequently followed by unfair competition made possible by the exploitation of a designated class of employees. It would seem that public welfare is enhanced by legislation based upon humane consideration of this character, legislation justified as an exercise of the police power. The *Adkins* case was decided at the time of an era of comparative prosperity. This court is not prepared to assert that the same conclusion would have been reached had economic and industrial conditions then been as they were at the time of the enactment here involved.

The police power is inherently vested in the Legislature. It was never surrendered by the several states and consequently its free exercise is not necessarily impeded by the 14th amendment to the Federal Constitution. Through the exercise of this power "the state may regulate the relative rights and duties of all persons within its jurisdiction, so as to guard the public safety, protect the public morals, secure the public welfare and promote the common good and welfare". (*People* v. *Byrne*, 99 Misc., 1; *Jacobson* v. *Mass.*, 197 U. S. 11, p. 25; *People* v. *Adirondack Ry. Co.*, 160 N. Y., 225 p. 236).

In the case last cited, in speaking of the power of taxation, the police power and the power of eminent domain, the court said that these powers "* * * underlie the Constitution and rest upon necessity because there can be no effective government without them. They are not conferred by the Constitution but exist because the state exists, and they are essential to its existence. They are not rights reserved, but rights inherent in the state as sovereign. While they may be limited and regulated by the Constitution, they exist independently of it as a necessary attribute of sovereignty. They belong to the state because it is sovereign, and they are a necessity of government. The state cannot surrender them, because it cannot surrender a sovereign power. It cannot be a state without them. They are as enduring and indestructible as the state itself".

Other well established legal principles are pertinent to the present inquiry.

Thus it is held that to warrant a court in declaring an act unconstitutional, the conflict between the statute and the constitution must

be "plain and unmistakable" and "that every presumption is in favor of the validity of a legislative enactment" (*People, &c.*, v. *Ryan*, 230 A. D., 252, p. 254; *City of Buffalo* v. *Hawks*, 226 A. D. 480, p. 485, aff'd. 251 N. Y., 588; *People &c.*, v. *Carter and Rice*, 135 N. Y., 473, p. 484; aff'd. 257 N. Y., 578; *Gardner* v. *Genther*, 232 A. D., 296, p. 298).

And if a reasonable doubt exists as to its validity the act should be upheld. Every reasonable doubt must be resolved in favor of its validity. (*City of Buffalo* v. *Hawks, supra; Gardner* v. *Genther, supra*).

Moreover, the acts of a Legislature are presumed to be "within its constitutional authority unless the contrary clearly appears" (*Schieffelin* v. *Goldsmith*, 253 N. Y. 243, p. 249; *Matter of McAneny* v. *Board*, 232 N. Y., 337 p. 389; *People ex rel. Cotte* v. *Gilbert*, 226 N. Y. 103, p. 106).

It is also the rule that one who asserts the invalidity of a statute or a classification must prove his contention (*People &c.* v. *Byrne, supra; Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194).

It has also been stated that: "As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute." (*O'Gorman* v. *Insurance Company*, 282 U. S., 251, p. 257–8; *People &c.*, v. *Katz*, 140 Miscellaneous 46, p. 47).

No proof of fact is here adduced in contradiction of the factual situation declared to exist by the Legislature. These facts so deemed to

exist form the basis for the conclusion that this legislation is not unconstitutional as exceeding the permissible bounds of the exercise of the police power, and it would not appear that it may be so decreed as matter of law.

Although the question is not here raised it may not be inappropriate to say that it does not appear that the minimum wage law evidences an unwarranted delegation of Legislative power to an administrative board or body. The act does not authorize the exercise of unlimited discretion in an undefined field. On the contrary a standard is prescribed. That standard is found in the definition of "a fair wage," which limits the authorized discretion of the administrative body within the confines indicated by the definition. In this respect the act is not defective for the reasons advanced in the recent decision of the United States Supreme Court in the Schecter case.

Without doubt, this legislation was prompted by humane and beneficient considerations. The intent was to protect a designated class from injustice and exploitation, thereby also promoting the public welfare by diminishing one cause of unfair competition with its resulting industrial chaos.

The writ is accordingly dismissed.

June 27, 1935.

COURT OF APPEALS

PEOPLE EX REL. JOSEPH TIPALDO,

Relator-Appellant.

against

FREDERICK L. MOREHEAD, as the Warden of the City Prison of the Borough of Brooklyn,

Respondent.

(2) Opinions of Court of Appeals

Crane, Ch. J.:—The appellant is the Manager of a laundry establishment operating in the borough of Brooklyn. Together with three other individuals he was indicted by the Grand Jury of Kings County for the violation of the Minimum Wage Law for Women (Laws of 1933, Ch. 584, in effect April 29, 1933). He was charged with the crime of paying to an adult woman employee a wage less than that promulgated by the Industrial Commissioner as the mandatory minimum wage applicable to such a woman engaged in that employment, in violation of section 565, subd. 2 of the Labor Law. By this habeas corpus proceeding the relator seeks to test the legality of his arrest and imprisonment, raising as the only question before the court the constitutionality of the statute, for the violation of which he has been held for trial. His contention is that the law contravenes the Fourteenth Amendment of the Constitution of the United States, and Article I, Section 6 of the Constitution of the State of New York, both of which provisions are the same in this particular.

Chapter 584 of the Laws of 1933, thus attacked, is entitled, "An Act to amend the labor law, in relation to the determination and establishment of minimum fair wage standards for women and minors, with provision for the imposition of penalties for the violation thereof." The applicability of the law as to minors is not questioned. The act provides the machinery for determining the minimum wage to be paid women in "an industry, trade or business or branch thereof or class of work therein in which women or minors are gainfully employed, but shall not include domestic service in the home of the employer or labor on a farm." The act defines "an oppressive and unreasonable wage" to be a wage which is both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health. "A fair wage" shall mean a wage fairly and reasonably commensurate with the value of the service or class of service rendered. In establishing the fair minimum wage the Commissioner and the wage board may take into account (1) all relevant circumstances affecting the value of the service or class of service rendered; (2) may be guided by like considerations as would guide a court in a suit for the reasonable value of service rendered where services are rendered at the request of an employer without contract as to the amount of the wage to be paid; and (3) may consider the wages paid in the State for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards.

Section 552 reads as follows:

> "It is hereby declared to be against public policy for any employer to employ any

> woman or minor in an occupation in this state at an oppressive and unreasonable wage as defined in section five hundred and fifty-one of the article and any contract, agreement or understanding for or in relation to such employment shall be null and void."

The rest of the act provides for the establishment of a wage board, for hearings, for the determination of the minimum wage, and for the directory order of the Commissioner regarding the payment thereof.

Section 565, subd. 2, for violation of which the relator has been indicted and imprisoned, reads as follows:

> "Any employer or the officer or agent of any corporation who pays or agrees to pay to any woman or minor employee less than the rates applicable to such woman or minor under a mandatory minimum fair wage order shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than fifty nor more than two hundred dollars or by imprisonment of not less than ten nor more than ninety days or by both such fine and imprisonment, * * *."

We do not see wherein this act differs materially from the act of Congress ruled upon in *Adkins* v. *Children's Hospital* (261 U. S. 525), wherein it was held that the Minimum Wage Act of September 19, 1918, Ch. 174, 40 Stat. 960, was an unconstitutional interference with the liberty of contract. The interpretation of the Federal Constitution by the United States Supreme Court is binding upon us; we are in duty bound to follow its decisions unless they are inapplicable. We

find no material difference between the act of Congress and this act of the New York State Legislature. The act of Congress, it is said, was to protect women from conditions resulting from wages which were inadequate to maintain decent standards of living. The attorney-general's brief states it in these words: "The purpose of the statute in the *Adkins* case was to guarantee a wage based solely upon the necessities of the workers. * * * The statute did not provide for the wages to have any relationship to earning power; was applicable to all vocations and not to the character of the work. * * * As contrasted with this statute, the New York Minimum Wage Law provides a definite standard for wages paid. It provides that the worker is to be paid at least the value of the services rendered."

This is a difference in phraseology and not in principle. The New York act, as above stated, prohibits an oppressive and unreasonable wage, which means *both* less than the fair and reasonable value of the services rendered *and* less than sufficient to meet the minimum cost of living necessary for health. The act of Congress had one standard, the living wage; this State act has added another, reasonable value. The minimum wage must include both. What was vague before has not been made any clearer. One of the elements, therefore, in fixing the fair wage is the very matter which was the basis of the Congressional act. Forcing the payment of wages at a reasonable value does not make inapplicable the principle and ruling of the *Adkins* case.

The distinctions between this case and the *Adkins* case are differences in details, methods and time; the exercise of Legislative power to fix wages in any employment is the same. We

should follow the law as given, and not speculate as to the changes which have come or are supposed to have come to economic conditions in the last decade which may move the Supreme Court to a further consideration of its ruling. The *Adkins* case has not been lightly passed over nor its rulings forgotten. It was cited and followed in *Wolff Company* v. *Industrial Court*, 262 U. S. 522; *Murphy, as Atty.-Gen.* v. *Sardell*, 269 U. S. 530; *Tyson* v. *Banton*, 273 U. S. 418; *Donham* v. *West-Nelson Mfg. Co.*, 273 U. S. 657; *Ribnik* v. *McBride*, 277 U. S. 350; and *Near* v. *Minnesota*, 283 U. S. 697.

When Minimum Wage Laws somewhat similar to our own have been challenged since the *Adkins* case the courts have felt bound by that decision to declare them unconstitutional without re-examination of the principles involved in those particular statutes (*The Topeka Laundry Co.* v. *The Court of Industrial Relations*, 119 Kan. 12; *Folding Furniture Works, Inc.* v. *Industrial Commission of Wisconsin*, 300 Fed. Rep. 991; *Stevenson* v. *St. Clair*, 161 Minn. 444; cf. *Holcombe* v. *Creamer*, 231 Mass. 99).

The order below must be reversed, the writ sustained, and the prisoner discharged, as Chap. 584 of the Laws of 1933, under which he is held, is unconstitutional according to *Adkins v. Children's Hospital*, 261 U. S. 525.

(O'Brien, Hubbs and Finch, JJ., concurred, with Crane, Ch. J.)

LEHMAN, J., *dissenting:*

The appellant is held in custody under an indictment. By writ of habeas corpus proceedings he challenges the legality of his commitment. The indictment charges, we are told, that the appel-

lant, as manager of the Spotlight Laundry, disobeyed a mandatory order, issued by the Industrial Commissioner under Article 19 of the Labor Law, commonly known as the minimum wage law for women and minors (Chapter 584 of the Laws of 1933) "prescribing certain minimum wages for certain adult women employees of the said laundry"; and that the appellant "conspired to make false entries in the time book of said laundry for the purpose of making it appear that the said adult women employees did in fact receive the amount of wages," ordered to be paid by the Industrial Commissioner. The wrong charged in the indictment finds its roots in the statute, and the appellant attacks the statute as unconstitutional and void. The State raises no objections to the form of the attack. It concedes that the appellant's detention is lawful only if the statute is constitutional. That is the only question presented upon this appeal.

Minimum wage laws, i. e., laws which require employers to pay to women and children employed by them a wage which shall not fall below a fixed minimum amount, have been enacted by many foreign countries; and, in the United States, sixteen states have enacted such statutes. So, also the Congress of the United States in 1918 provided for the fixing of minimum wages for women and children in the District of Columbia. 40 Stat. 964 c. 174. Such a statute constitutes a restriction on freedom of contract protected by the Fifth and Fourteenth Amendments of the Constitution of the United States. On that ground, the Supreme Court of the United States in *Adkins vs. Children's Hospital*, 261 U. S. 521, decided that the provisions of the Federal statute there challenged,

at least insofar as they applied to adult women, violated the constitutional limitation upon legislative power. We are told that under that decision and for the same reasons which induced the Supreme Court to declare the Federal Statute unconstitutional, we are bound to declare the New York statute void and unconstitutional.

There can be no doubt that the determination in that case that the Federal statute transcended the legislative power of Congress over the District of Columbia, made futile further argument that the statutes enacted by the various states, which were open to the same objections, should be sustained by the courts of those states. The Supreme Court of the United States must construe the provisions of the constitution and its definition of inviolate rights guaranteed by the constitution and of the division or restriction of powers thereunder must be accepted by all other courts of the country. A state court may previously have decided the same question. Such decision is of no effect after the Supreme Court of the United States has construed otherwise the constitution which binds all, and when the same question arises again in a state court it must follow the decision of the Supreme Court regardless of its own opinion. *Topeka Laundry Co.* vs. *Court of Industrial Relations*, 119 Kansas 12; *Stevenson* vs. *St. Clair*, 161 Minn. 444. Cf. *Sparks* vs. *Moritz*, 141 Wash. 417. The effect of the decision, there, is not measured by the persuasive force of the arguments which support it; for under any system of orderly administration of the law, it is the function of the court of last resort to pass finally upon the cogency of conflicting arguments and the weight of conflicting considerations. The

effect is not measured by the unanimity or lack of unanimity of the court, for the decision by a majority of one becomes the decision of the court. So Mr. Justice Holmes, who dissented forcibly in the *Adkins* case, bowed to the decision as a precedent and concurred on the ground alone in later decisions of similar purport *Murphy* vs. *Sardell*, 269 U. S. 530. Cf. *Donham* vs. *West-Nelson Manufacturing Co.*, 273 U. S. 657.

That does not mean, of course, that a court of last resort may not reconsider the same question when it is again presented, and then reach a contrary conclusion. In the light of wider experience, broader information or changed conditions, the weight that should, reasonably, be given to conflicting considerations may change and error may become manifest. A constitution may be amended only in manner provided therein, but a court which under the constitution is charged with the duty of construing the constitution may change its construction when convinced of error. That courts have not been willing to perpetuate a construction after they have been convinced of its unsoundness, has been a source of strength to our system of constitutional government. The Attorney-General, upon this appeal, argues that the statute now under consideration is free from the objections to the earlier "Minimum Wage" legislation, which the Supreme Court, in the *Adkins* case, held to be in violation of the provisions of the constitution; but urges, also, that time and experience have demonstrated the soundness of the dissenting opinions there, and that the Supreme Court would now decide differently if the same objections were presented. What the Supreme Court would now decide rests purely in

conjecture, and even though we should assume that a court might under any circumstances properly base decision upon such conjecture, we should certainly hesitate to venture upon such an uncharted and treacherous sea. We start our consideration of the validity of the statute here challenged upon the assumption that the construction placed upon the constitution by the decision of the Supreme Court in the *Adkins* case is open to attack only in that court. Our personal views of the soundness of that construction then become irrelevant, except insofar as they might, perhaps even unconsciously, dictate our conclusion as to how far such construction should be carried.

Article 19 of the Labor Law, which the appellant now attacks, provides, in section 552 that "It is hereby declared to be against public policy for any employer to employ any woman or minor in an occupation in this state at an *oppressive and unreasonable wage* as defined in section five hundred and fifty-one of this article, and any contract, agreement or understanding for or in relation to such employment shall be null and void." The definition contained in section 551 is " 'an oppressive and unreasonable wage' shall mean a wage which is *both* less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health" (Italics are ours throughout this opinion.) The same section defines "a fair wage" as "a wage fairly commensurate with the value of the service or class of service rendered." The statute then provides for the manner in which a "minimum fair wage" shall be fixed in occupations where "any substantial number of women

or minors are receiving oppressive and unreasonable wages as defined in section five hundred and fifty-one" and the manner in which employers in such occupations may be induced or compelled to pay the "minimum fair wage" so fixed.

The statute is unquestionably a "price fixing" statute. Ordinarily the price paid for labor, like the price to be paid for goods, is determined by agreement of the parties primarily concerned. The right by agreement to fix prices, whether of labor or goods, is part of the freedom of which no person may be deprived without "due process of law." The attack upon the statute is directed mainly to the point that the state violates this constitutional guarantee whenever it attempts to fix a fair wage for adults who are fully competent to enter into contracts fixing wages at a price which they are willing to accept, rather than reject employment offered to them at such wages. Inextricably interwoven in that attack are objections based upon the method of fixing "minimum fair wages" and the effect of the enforcement of payment of such wages as provided in this statute. We postpone analysis of the provisions for fixing the "minimum fair wage" and for enforcement of payment, until we have determined the extent of the power of the state to interfere in any form or manner with the free exercise of the right by adults of competent mental ability to fix wages by contract.

"There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the exist-

ence of exceptional circumstances. Whether these circumstances exist in the present case constitutes the question to be answered." *Adkins vs. Childrens Hospital, supra.* Thus in the case upon which the appellant here relies, it was authoritatively held that the state under *exceptional* circumstances may place some restraint upon freedom of contract. The difference of opinion in the court concerned only the question of whether the circumstances were so exceptional as to justify, reasonably, the restraints imposed.

The general rules which govern consideration of the validity of a statute which restricts liberty of contract are, indeed, too well established to be challenged now. Liberty of contract is "subject to restrictions passed by the Legislative Branch of the Government in its exercise of this power to protect the safety, health and welfare of the people." *McLean vs. Arkansas,* 211 U. S. 539. "The guaranty of due process, as has been often held, demands only that the law shall not be unreasonable, arbitrary or capricious; and that the means selected shall have a real and substantial relation to the object sought to be obtained." *Nebbia vs. People,* 291 U. S. 502. Liberty to fix by contract the price of labor does not differ in its nature from liberty to fix other terms and conditions of employment though, it may be conceded, that restriction there may encroach more seriously upon the essentials of our economic competitive system. Thus, perhaps, circumstances which might reasonably justify restrictions upon contracts in matters less vital might be insufficient here. Here, too, however, there are many instances where the state has been justified in imposing restrictions under its reserved police power to

legislate for the general welfare. The difference then is, at most, one of degree. "Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other." *Home Building and Loan Association vs. Blaisdell*, 290 U. S. 398. It is with the background of these general rules that we must analyse the provisions of Article 19 of the Labor Law now challenged.

The Legislature in section 550 of that article has set forth the conditions which in its opinion called for the exercise of the reserved power of the state:

> "The employment of women and minors in trade and industry in the state of New York at wages unreasonably low and not fairly commensurate with the value of the services rendered is a matter of grave and vital public concern. Many women and minors employed for gain in the state of New York are not as a class upon a level of equality in bargaining with their employers in regard to minimum fair wage standards, and 'freedom of contract' as applied to their relations with their employers is illusory. Since a very large percentage of such workers are obliged from their week to week wages to support themselves and others who are dependent upon them in whole or in part they are, by reason of their necessitous circumstances,

forced to accept whatever wages are offered them. Judged by any reasonable standard, wages are in many cases fixed by chance and caprice and the wages accepted are often found to bear no relation to the fair value of the service rendered. Women and minors employed for gain are peculiarly subject to the overreaching of inefficient, harsh or ignorant employers and under unregulated competition where no adequate machinery exists for the effective regulation and maintenance of minimum fair wage standards, the standards such as exist tend to be set by the least conscionable employers. In the absence of any effective minimum fair wage rates for women and minors, the constant lowering of wages by unscrupulous employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers and threatens the stability of industry. The evils of oppressive, unreasonable and unfair wages as they affect women and minors employed in the state of New York are such as to render imperative the exercise of the police power of the state for the protection of industry and of the women and minors employed therein and of the public interest of the community at large in their health and well-being and in the prevention of the deterioration of the race. In the considered judgment of the legislature this article is constitutional."

The appellant does not challenge these findings of fact by the Legislature, nor does he challenge the statements in the "factual brief" submitted

by the respondent to sustain and amplify these findings. Though no reasonable man, today, can doubt the mental capacity of women and though, happily, in this country there are few vestiges of the ancient law which discriminated between men and women and incapacitated women from entering upon independent industrial, business or professional careers, yet it is notorious that in the free competition of such careers they are at a disadvantage with men. The reason may be found in ancient prejudice, in custom, in training or in physical difference. Whatever may be the reason, the fact is patent that often women are willing or forced to accept lower compensation for service than men receive in the same occupation. If wages constitute a "fair and reasonable value of the services rendered, perhaps it would be arbitrary to require an employer to pay more, even though such wages be "less than sufficient to meet the minimum cost of living necessary for health." Cf. *Adkins vs. Childrens Hospital, supra.* If wages are *both* less than the "fair and reasonable value of the services rendered" *and* less than sufficient to meet the minimum cost of living necessary for health some element of inequality or oppression may reasonably be found to enter into the bargain.

From wages so fixed a vicious chain of results may follow. The health of the underpaid women suffers, or they must become a burden upon their families or communities. That is a matter which is certainly of public concern and which might well engage the attention of the Legislature. It is clearly unjust that an unscrupulous employer should obtain the services of his employees upon payment of wages "less than the

value of the services rendered" and that the community should bear the burden of his cupidity. True, not all employers who pay such inadequate wages are unscrupulous. In unrestrained competition an employer can seldom afford to increase his costs beyond those paid by his competitors. Thus if in any occupation a considerable number of persons are employed at "unreasonable and oppressive wages" by those willing to profit by the weakness of their employees, more scrupulous employers may be driven to pay the same wages. Competition, however desirable generally, becomes unfair when one employer by the use of practices which, though not unlawful, are unjust and injurious to his employees or to the public, can force his competitors to the wall or compel them to avail themselves of the same practices. It has been held in many cases that under such circumstances the Legislature may, within proper limits, restrain such practices. That is in the interest of true competition.

The vicious result of oppressive wages does not stop even with the underpaid wage earner. It extends throughout the industry and in lesser degree even beyond the industry. Labor which for one reason or another is deficient in bargaining power has come to be known as "cheap labor," that is, labor which fails to obtain wages commensurate with the value of the services rendered. Just as experience has shown that, in a community where peonage or slavery exists, free labor cannot flourish, so in an industry, or even community, where oppressive wages are paid to those deficient in bargaining power, it is not unreasonable to believe that such wages affect

indirectly but nevertheless very substantially the wages of all others. At least the Legislature might so find. It cannot then be gainsaid that the conditions which the Legislature found to exist call for some remedy. Indeed, the appellant does not seriously argue otherwise. The real question here presented is whether the remedy applied is rasonable and complies with the requirements of "due process, as defined by the Supreme Court, without which there may be no restriction upon liberty of contract.

Here, we may profitably examine the prevailing opinion in *Adkins* v. *Children's Hospital, supra,* to determine whether the statute now under consideration is subject to the objections which dictated the conclusion of the court in that case. In that case the statute provided for the fixing of standards of minimum wages for women in any occupation adequate "to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals." No other standard was there prescribed. It was there said that "while the physical differences (between men and women) must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, *sui juris,* require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances." We accept that statement with all its implications.

The Legislature has then no greater power to restrict the liberty of women than of men. All

are equally entitled to the protection of the law, and, in regard to all, liberty of contract is the rule and restriction can be justified only by exceptional circumstances. What was said by the court can mean only that. None the less, just as in legislation in relation to health, the physical differences between men and women may properly be taken into account, so in legislation in other fields, the Legislature cannot reasonably be required to disregard actual conditions which affect women differently from men. The test in each case is whether the conditions justify the remedy regardless of whether those conditions affect men or women. Classification must of course be based upon actual conditions, not outworn theories of sex inferiority or superiority. In the *Adkins* case, the question was whether the Legislature could require an employer to pay minimum wages to women sufficient to maintain them in good health and to protect their morals, regardless of the value of the service rendered. The court held that such a requirement is unreasonable in its nature and not justified because it is confined to women. In this case the question is whether employers can be compelled to pay women wages which are not "oppressive." There is here no contention that the legislation is justified on the ground that the Legislature may restrict the liberty of women where it could not restrict the liberty of men. The Legislature has found that women are not "*as a class* upon a level of equality in bargaining with their employers in regard to minimum fair wage standards and 'freedom of contract' as applied to their relations with employers is illusory." Undoubtedly there is ground

for the belief that women are paid less than men in most occupations. That groups of men may also be paid "oppressive" wages may be entirely true. Perhaps they, too, should be protected by similar legislation. Upon that question we are not now called upon to pass. It is sufficient to point out that here the Legislature has not unlawfully discriminated between groups or sexes. Since it might reasonably be found that in the unrestrained play of economic forces, women as a class are at a disadvantage, with resultant injury to the general welfare, the Legislature might in its discretion adopt legislation, confined to them, which is reasonably adapted to meet the conditions peculiarly affecting them. The distinction is not based upon assumed need to protect the health or morals of women but upon the need of protecting the public against the evil of "oppressive" wage contracts imposed upon women because of economic conditions peculiarly affecting women. So in this case, as in the *Adkins* case, the fundamental question is whether the remedy is reasonable and appropriate.

In the *Adkins* case the court said that the law forbids "two persons having lawful capacity—under penalties as to the employer—to freely contract with one another in respect to the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequence may be to oblige one to surrender a desirable engagement and the other to dispense with the services of a desirable employee." That criticism might be applied to the earlier statute; it has no application here, for as we have shown,

the Legislature might reasonably find that acceptance of a contract for wages less than the reasonable value for services rendered and less than the minimum cost of healthful living must from its nature be induced by the necessities of the wage earner rather than by any opinion that the employment is "desirable." Then the court said: "The price fixed by the board need have no relation to the capacity or earning power of the employee, the number of hours which may happen to constitute the day's work, the character of the place where the work is to be done, or the circumstances or surroundings of the employment; and while it has no other basis to support the necessities of the employee, it takes no account of any independent resources she may have." Again, this objection does not apply to the statute now challenged. It has, as we have shown, other basis than the "necessities of the employee." Its basis is rather that wages which bear no fair relation "to the capacity or earning power of the employee, the number of hours which may happen to constitute the day's work, the character of the place where the work is to be done, the circumstances or surrounding of the employment"; in other words, relation to all those conditions might enter into the measure of fair compensation for the value of services, are not fair wages; and when in addition, they are insufficient to maintain the health of the employer, such wages are detrimental to the general welfare.

The next source of invalidity in the *Adkins* case is the uncertainty of the standard to be applied in fixing the minimum wages which must be made. There the formula to be applied was the "neces-

sary cost of living to any such women workers to maintain them in good health and to protect their morals." Here the formula to be applied *in fixing wages* is that of "a fair wage" as defined by the statute: *i.e.*, "a wage fairly and reasonably commensurate with the value of the service or class of service rendered." The necessities of the employee do not enter into that standard. True, under the statute, jurisdiction to fix fair wages is made dependent upon a finding that the wages paid to a substantial number of women or minors is "less than the minimum cost of living necessary to health," but even though, as the Supreme Court has pointed out, the necessary cost of living is not "a precise or unvarying sum," yet obviously there must be a point where determination with reasonable certainty is possible that wages paid are *less* than the necessary cost of living to maintain a woman in good health. Thus the objection to the standard in the statute considered in the *Adkins* case has no application here. We postpone consideration whether similar objections might be raised to the standards to be applied under the present statute until after we have completed analysis of the objections set forth in the opinion in the *Adkins* case.

It is further said in that opinion that "the law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course the privilege of abandoning his business as an alternative for

going on at a loss. * * * It compels him to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee. It therefore undertakes to solve but one-half the problem. The other half is the establishment of a corresponding standard of efficiency, and this forms no part of the other policy of the legislation, though in practice the former half without the latter must lead to ultimate failure in accordance with the inexorable law that no one can continue indefinitely to take out more than he puts in without ultimately exhausting the supply. To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole."

Here we reach the crux of the objections, which in the opinion of the Supreme Court, rendered the earlier statute arbitrary and unreasonable and here, too, it is evident that the Legislature, in the new statute, recognized, these objections and sought to provide a remedy which should be free from them. Assuming that it is possible to measure in accordance with the provisions of the statute the "value of the service or class of service" rendered, it is clear that a requirement that the employer shall not be permitted to pay less than such value does not "compel the employer to pay a sum which the employee is not

capable of earning nor can it fairly be said that the law compels payment irrespective of the ability of the business to bear the burden, for with the exception perhaps of a business which can exist only through practices which are unfair and economically unsound, a business must ordinarily be able to bear the burden of paying fair compensation for service given to the business. An employer who pays wages less than that, and less than the cost of healthful living, places upon society the burden of paying part of the legitimate costs of the business.

That these differences are vital appears from the opinion itself in the *Adkins* case, for it continues: "The feature of this statute which perhaps more than any other puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business or the contract or the work the employee engages to do. The declared basis, as already pointed out, is *not the value of the service rendered*, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals." The exact opposite is true in this case. "The moral requirement implicit in every contract of employment, viz., that the amount to be paid and the service to be rendered, shall bear to each other some relation of just equivalence, is completely ignored" in the earlier statute. It is not ignored here. Indeed what the statute aims to do is to declare that "the moral requirement implicit in every contract of employment" cannot be excluded by agreement of parties where

through such exclusion the general welfare may suffer. Indeed, the court went further in the *Adkins* case and expressly pointed out that a statute like the one under consideration might not be subject to the objections there held insuperable, saying: "A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, *to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service,* would be understandable. But a statute which prescribes payment without regard to any of these things and solely with relation to circumstances apart from the contract of employment, the business affected by it and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States."

We have assumed so far that the provisions for fixing wages are fair and provide a standard which can be applied by administrative officers. That assumption must now be tested by analysis of the statute itself. The statute does not require that every employer shall pay a minimum "fair" wage, nor that at his peril and to avoid criminal prosecution, any employer must determine what is a "fair" wage. An employer must pay such a wage only where such a wage has been fixed for a particular service or class of service in a particular industry by administrative order, and where a further order has been made requiring employers in that industry to pay the minimum wage so fixed. Such an order may be made only when, on the basis of information in the possession of the industrial commissioner or the director of the minimum wage bureau, the commissioner is

of opinion that "any substantial number of women or minors in any occupation or occupations are receiving oppressive and unreasonable wages as defined in section 551." Even then he may not proceed summarily to make an order fixing wages, but must "appoint a wage board to report upon the establishment of minimum fair wage rates for such women or minors in such occupation." Section 554.

The minimum wage board must be composed of not more than three representatives of the employers in any occupation or occupations, an equal number of representatives of the employees in such occupation or occupations and not more than three disinterested persons representing the public. "Within sixty days of its organization a wage board shall submit a report including its recommendation as to minimum fair wage standards for women or minors for the occupation or occupations, the wage standards of which the wage board was appointed to investigate." Section 555. That means "a wage fairly commensurate with the value of the service or class of service rendered. In establishing a minimum fair wage for any service or class of service under this article the commissioner and the wage board without being bound by any technical rules of evidence or procedure (1) may take into account all relevant circumstances affecting the value of the service or class of service rendered, and (2) may be guided by like considerations as would guide a court in a suit for the reasonable value of services rendered where services are rendered at the request of an employer without contract as to the amount of the wage to be paid, and (3)

may consider the wages paid in the state for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards." (Section 551.)

It is said that the standard of fair value of services is too indefinite for accurate application. It is true that value is ordinarily determined by competitive agreement, and here, it is plain, the board is required to fix a value different from the value fixed by such agreement. Courts and juries are at times required to fix values when there is no market price, and many price-fixing statutes have been sustained in occupations affected by a public interest, though there, too, the same difficulty may exist. The difficulty is met if some reasonable basis exists for fixing wages. Before a report of the wage board becomes effective there must be a public hearing, and only when the commissioner, after such hearing, has approved, can any order be made fixing the "fair wage." (Sections 556 and 557). Even then the order remains only directory for nine months. It can be made mandatory thereafter, but only upon a new public hearing. (Section 560.) At any time after an order fixing such wages, whether directory or mandatory, has been in effect a year, there must be a reconsideration of the wage upon the petition of fifty or more residents of the state. (Section 562.) In addition there is a right of review by the Industrial Board, and the courts, "from any ruling or holding on a question of law included and embodied in any decision or order of the commissioner or the director. (Section 563.) and upon such review the reasonableness of any rule or order may be challenged. Labor Law Article 3.

An order so made seems to comply in all respects with constitutional requirement. The Legislature has set a standard which must guide the administrative officers. Though the standard cannot be applied mechanically, it is sufficient in most cases to admit of conclusions reasonably drawn from the evidence presented and which can be tested by application of rules of reason. The statute provides a hearing to all persons affected and a judicial review of the reasonableness of the conclusions drawn. There may, quite possibly, be exceptional cases where no evidence can be produced, from which any conclusion can logically be drawn. Then any person may attack the reasonableness of the finding. No such attack is here made, and an examination of the report of the wage board shows ample evidence to support its conclusion.

Doubtless in the application of the statute injustice to individuals may at times arise. Argument may be made that economic wrongs are but corrected by the free play of economic forces. Doubtless that consideration has dictated the conclusion of the courts in many cases where statutes restricting competition have been declared unconstitutional. Our economic system is based upon competition, and when we say liberty of contract is the rule and restriction can be justified only by exceptional circumstances, we probably mean just that. None the less, restrictions within reasonable limits and upon reasonable grounds are justified, and so long as the Legislature does not exceed those limitations it must determine whether the price that must be paid for restrictions is overbalanced by the results that may reasonably be

expected from such restrictions. It is said that if the court permits the fixing of minimum prices, it must also permit the fixing of maximum prices. The problem is not so simple. We hold only that in this case the Legislature might reasonably fix minimum prices for women because within the limited field covered by the statute some employers have taken advantage of the economic weakness of women to the public injury. Competition there, it has been found, has been at times illusory, and at times unfair and has worked injury to the general welfare. Whether a law fixing maximum prices could ever be justified by circumstances so compelling as to render the law reasonable is not involved. Price fixing by free contract must remain unrestrained so long as it does not injure the public welfare. In each case the test is whether the restriction is justified and in conformity to "due process."

Here it may be interesting to observe that in this case no employer or employee has challenged the fairness of the wage fixed or claims it may result in injustice. The wage board agreed unanimously upon the amount of a fair wage in the laundry industry. No person appeared at the public hearings to object to the wage so fixed. No person sought a review of the order by appeal to the Industrial Board. The order has been in force for several years and there has been no application for a reconsideration. Even upon this appeal, a brief in support of the law has been filed by a trade association of owners of laundries, and the only person attacking the law is the appellant who has been charged with concealment of disobedience of the law by false entries. In such circumstances it can hardly be said that at least insofar as concerns the laundry business,

the statute or the wage fixing order is unfair or unreasonable. When orders are issued fixing wages of women in other occupations the courts may be called upon to decide whether they are reasonable and justified by the evidence.

We are told that this statute, though enacted primarily for the protection of women, may eventually result in injury to them; for some employers may prefer to employ men if they can obtain male employees for less wages than the law requires for women employees. That adult male employees of equal efficiency can be obtained at less than the minimum wage fixed for women and minors is contrary to common experience and contrary to the findings of the Legislature. Under these circumstances, that objection is one which the Legislature might reasonably disregard. If in truth it should appear that any substantial number of men have because of price fixing orders supplanted women in any industry, that might be convincing evidence that the orders were unreasonable. No such contention has been made by the appellant.

We are further told that such orders may work hardship to industries in some districts. The statute has provided against that:

> "5. A wage board may differentiate and classify employments in any occupation according to the nature of the service rendered and recommend appropriate minimum fair rates for different employments. A wage board may also recommend minimum fair wage rates varying with localities if in the judgment of the wage board conditions make such local differentiation proper and do not effect an unreasonable discrimination against any locality."

It is argued that the differentiation is permissive, not mandatory. That may be true, but a permissive right to differentiate becomes mandatory where failure to exercise it would be unreasonable. There as elsewhere the judgment of the board is subject to judicial review.

We have considered all the objections urged by the appellant or which have occurred to us, though perhaps the consideration of some of these objections rests exclusively with the Legislature. Doubtless some persons may suffer hardship. There may be some women replaced by other women of greater efficiency. Some business, which are economically unsound, may be discontinued. Such individual hardships may be the result of any restriction upon competition, but greater hardships of the same kind may be the result also of unrestricted competition, especially where that competition is tainted with overreaching or other unfair practices. The Legislature doubtless weighed these objections, they are not so weighty that a court should say the Legislature could not reasonably find that they are overbalanced by countervailing anticipated benefits.

Can such a statute be declared unconstitutional by the courts? The conditions which the Legislature seeks to remedy are not imaginary. The Legislature might reasonably find that they are caused by oppressive exercise of liberty of contract, and that removal of such conditions is necessary for the general welfare. The remedy devised is reasonably calculated to end those conditions, though perhaps the remedy may carry in its train other evils. The remedy is on the whole not unfair to employers or to employees;

though individuals may suffer hardship. Other countries with traditions similar to our own have adopted remedies more drastic to meet analogous conditions. The restriction upon liberty of contract is directed against a harmful and perhaps unfair use of that liberty. The constitutional limitations upon legislative power must be enforced by the court, but they may not be extended beyond their fair meaning. Liberty of contract, like other forms of liberty, must be zealously guarded against invasion by the state, but fear that in the future the state may encroach by unreasonable legislation upon the liberties of the individual cannot justify a present limitation upon the powers of the state, not expressed or clearly implicit in the Constitution. Liberty may be reasonably restrained upon grounds of general welfare. Courts must decide each case upon the facts there presented; upon the facts presented in this case we do not find any ground for saying that the Legislature has acted arbitrarily or transcended the limitations upon its powers.

Order should be affirmed with costs.

(CROUCH and LOUGHRAN J. J. concurred with LEHMAN, J.).

APPENDIX C

COURT OF APPEALS

State of New York, } ss.:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 3rd day of March, in the year of Our Lord One Thousand Nine Hundred and Thirty-Six, before the Judges of said Court.

Witness:

THE HON. FREDERICK E. CRANE,
Chief Judge, Presiding.

WILLIAM J. ARMSTRONG,
Clerk.

REMITTITUR—March 4th, 1936.

PEOPLE EX REL. JOSEPH TIPALDO,
Relator-Appellant,

against

FREDERICK L. MOREHEAD, as the Warden of the City Prison, in the Borough of Brooklyn,
Respondent.

Be it remembered, that on the 6th day of December, in the year of Our Lord One Thousand Nine Hundred and Thirty-Five, Joseph Tipaldo, the appellant in this cause, came here into the Court of Appeals by Goldberg & Levitt, his attorneys, and filed in the said Court a Notice of

Appeal and return thereto from the order of the Supreme Court, Kings County, and Frederick L. Morehead, as Warden of the City Prison, in the Borough of Brooklyn, the respondent in said cause, afterwards appeared in said Court of Appeals by John J. Bennett, Jr., Attorney General.

Which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed. The Court of Appeals having heard this cause argued by Mr. Nathan L. Miller, of counsel for the appellant; and by Mr. Henry Epstein, for the respondent; and by Mr. Charles J. Campbell, for New York State Hotel Association, as *amicus curiae;* brief filed by other *amici curiae;* and after due deliberation had thereon, did order and adjudge that the order of the Supreme Court appealed from herein be, and the same hereby is, reversed, the writ sustained and the prisoner discharged. A question under the Federal Constitution was presented and necessarily passed upon by this Court, viz: that Chapter 584 of the Laws of 1933 of the State of New York contravenes the Fourteenth Amendment of the Constitution of the United States. This Court held that the aforesaid statute does contravene the Fourteenth Amendment of the Constitution of the United States (*Adkins* v. *Children's Hospital,* 261 U. S. 525).

And it was also further ordered that the record aforesaid and the proceedings in this Court be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be reversed, the writ sustained and the prisoner discharged, etc., as aforesaid.

And hereupon, as well the notice of appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, be it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided to be enforced according to law and which record now remains in the said Supreme Court before the Justices thereof, etc.

JOHN LUDDEN (Signed),
Deputy Clerk of the Court of Appeals of the State of New York.

Court of Appeals,
Clerk's Office,
Albany, March 4th, 1936.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein; attached thereto.

JOHN LUDDEN,
Deputy Clerk.

(Seal)

At a Special Term, Part II of the New York Supreme Court, held in and for the County of Kings, at the County Court House, in the Borough of Brooklyn, City of New York, this 6th day of March, 1936.

Present:

HON. PETER P. SMITH,
Justice

PEOPLE EX REL JOSEPH TIPALDO,
Relator-Appellant,

against

FREDERICK L. MOREHEAD, as the Warden of the City Prison in the Borough of Brooklyn,
Respondent.

The above named Relator having appealed to the Court of Appeals from the order made by the Hon. Mitchell May on July 3rd, 1935, and entered in the office of the Clerk of the County of Kings, on the said day, whereby the above entitled habeas corpus proceeding was dismissed, and the Court of Appeals having heard said appeal, and ordered and adjudged that the order so appealed from be reversed, the writ of habeas corpus sustained and the Relator discharged from custody, and the record remitted from that Court, having been filed, from which it appears that a question under the Federal Constitution was presented and necessarily passed upon by the Court of Appeals, viz, that Chapter 584, Laws of 1933 of the State of New York contravenes the 14th

Amendment of the Constitution of the United States and that the Court of Appeals held that the aforesaid statute does contravene the 14th Amendment of the Constitution of the United States (*Adkins* v. *Children's Hospital,* 261 U. S. 525).

Now, on motion of Gates & Levitt, attorneys for the Relator, it is

Ordered, that the said judgment of the Court of Appeals be and the same is hereby made the judgment of this Court.

Enter

PETER P. SMITH,
J. S. C.

Granted March 6, 1936.

JOHN N. HARMAN,
Clerk.

State of New York }
County of Kings } *ss.:*

I, John N. Harman, Clerk of the County of Kings and Clerk of the Supreme Court of the State of New York in and for said County (said Court being a Court of Record) do hereby certify that I have compared the annexed with the original Order filed in my office March 7, 1936, and that the same is a true transcript thereof and to the whole of said original.

(For Attorney General. No fee).

In testimony whereof, I have hereunder set my hand and affixed the seal of said County and Court this 9th day of March, 1936.

JOHN N. HARMAN,
Clerk.

[Seal.]

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1935

FREDERICK L. MOREHEAD, as the Warden of the City Prison of the Borough of Brooklyn,

Petitioner,

against

PEOPLE EX REL. JOSEPH TIPALDO,

Respondent.

SIRS:

Please take notice that the annexed motion to advance will be presented to the Supreme Court of the United States, at Washington, D. C., on presentation of the accompanying petition for a writ of certiorari.

Dated, March 10, 1936.

Yours, etc.,

JOHN J. BENNETT, JR.,
Attorney-General, State of New York,
Attorney for Petitioner.

HENRY EPSTEIN,
Solicitor General, State of New York,
Of Counsel.

To:

GATES AND LEVITT, ESQS.,
Counsel for Respondent, Tipaldo.

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM 1935

FREDERICK L. MOREHEAD, as the Warden of the City Prison of the Borough of Brooklyn,

Petitioner,

against

PEOPLE EX REL. JOSEPH TIPALDO,

Respondent.

MOTION TO ADVANCE

Petitioner moves that this cause be advanced for an early hearing and prays that this motion be considered together with petition for certiorari in this cause.

In support hereof petitioner makes the following brief statement of the matters involved and the reasons for the speedy determination sought hereby.

The question presented is the validity under the United States Constitution of the New York State Minimum Wage Law (Chap. 584, Laws 1933 of New York). For two years the said law has functioned. There is in the Department of Labor of New York State a division devoted to the inquiry into and enforcement of the provisions of this law. Appropriations have been included

in the present budget to provide for personnel and other expenses. Those expenditures are authorized from the first day of July, 1936, when the fiscal year 1936-1937 begins. It is thus a matter of vital concern to the State of New York, to the persons whose employment may thus be involved, as well as to those industries affected, that a speedy ruling be had.

The immediate concern, however, is that of the State of New York and of its Department of Labor.

Dated, March 11th, 1936.

Respectfully submitted,

JOHN J. BENNETT, JR.,
Attorney-General, State of New York,
Attorney for Petitioner.

HENRY EPSTEIN,
Solicitor General, State of New York,
Of Counsel.

The undersigned, counsel for respondent Tipaldo, join in the above application and motion to advance this cause for early hearing.

Dated, March ..., 1936.

GATES AND LEVITT,
Attorneys,
Counsel for Respondent, Tipaldo.

FILE COPY

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APR
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IN THE

Supreme Court of the United States

OCTOBER TERM 1935

No. 838.

FREDERICK L. MOREHEAD, as Warden of the City Prison of the Borough of Brooklyn,
Appellant,

vs.

PEOPLE ex rel. JOSEPH TIPALDO,
Appellee.

APPELLANT'S BRIEF ON THE LAW

JOHN J. BENNETT, JR.,
Attorney General of the
State of New York,
Attorney for Appellant.

HENRY EPSTEIN,
Solicitor General,
JOHN F. X. MCGOHEY,
Assistant Attorney General,
Counsel.

BENJAMIN HEFFNER,
JOHN C. CRARY, JR.,
Assistant Attorneys General,
On the Brief.

INDEX

PAGE

TABLE OF CASES iii

STATEMENT 1

FACTS 2

THE PROVISIONS OF THE MINIMUM WAGE LAW FOR WOMEN AND MINORS IN NEW YORK STATE (Ch. 584, L. 1933) 2

DISCUSSION OF OPINION OF COURT OF APPEALS 10

ISSUE 14

POINT I—The New York Minimum Wage Law meets all requirements of due process under the Fourteenth Amendment 16

A. The end is legitimate and the means reasonable 17

(1) The assurance of a fair wage 17

(2) Elimination of sources of unfair competition 20

(3) Minimum wage legislation for women and minors has received general legislative recognition 20

B. The maintenance of the health of women in industry is of deep concern to the State. Where a lack of equality of bargaining power exposes persons to exploitation, legislation to remedy this situation will be sustained 22

C. The Courts have permitted the fixing of wages in industry 30

PAGE

POINT II—Adkins v. Children's Hospital, 261 U. S. 525, distinguished 32

A. The statutes are vitally dissimilar 32

B. Underlying questions of fact condition legislation 34

C. The opinion of this Court in Adkins v. Children's Hospital sustains the validity of the New York minimum wage statute 36

D. The New York Minimum Wage Law in operation 45

POINT III—The delegation of powers to the Wage Board and to the Industrial Commissioner, as contained in the Minimum Wage Law, is a proper exercise of legislative authority 49

POINT IV—The contention of the relator that the Minimum Wage Law is unconstitutional, in that it operates to compel him to be a witness against himself in a criminal case, is not relevant to the decision on this petition 52

POINT V—The statute being valid under the Fourteenth Amendment of the Constitution of the United States, the writ of habeas corpus should be dismissed and directions issued accordingly from this Honorable Court 53

APPENDIX A—New York State Minimum Wage Law 55

APPENDIX B—District of Columbia Minimum Wage Law 69

TABLE OF CASES CITED

PAGE

A

Adkins v. Children's Hospital, 261 U. S. 525 ..... 1, 10, 25, 31, 32, 36-45, 48
Atkins v. Kansas, 191 U. S. 207 ..... 16, 29

B

Block v. Hirsh, 256 U. S. 135 ..... 15, 28, 48
Borden's Farm Products Co. v. Baldwin, 293 U. S. 194 15
Bosley v. McLaughlin, 236 U. S. 385 22
Brazee v. Michigan, 241 U. S. 340 28
Brown v. Feldman, 256 U. S. 170 28
Bunting v. Oregon, 243 U. S. 426 ..... 15, 31

C

Central Lumber Co. v. South Dakota, 226 U. S. 157 20
Chastleton v. Sinclair, 264 U. S. 543 ..... 15, 48
Chicago R.R. v. Wellman, 143 U. S. 339 ..... 29, 30
Cotter v. Coatsville Boiler Works, 257 Pa. 411 19
Coty, Inc. v. Hearn Department Stores (N. Y. Law Journal, November 26, 1935, Supreme Court, New York County) 15

D

Donham v. West-Nelson Mfg. Co., 273 U. S. 657 30
Dunham v. Ottinger, 243 N. Y. 423 51

E

Erie R.R. Co. v. Williams, 233 U. S. 685 26
Euclid v. Ambler Realty Co., 272 U. S. 365 ..... 14, 35

F

Folding Furniture Works v. Industrial Commissioner, 300 Fed. 991 30

PAGE

G

German Alliance Ins. Co. v. Lewis, 233 U. S. 389.....26, 28
Glatzl v. Stumpp, 220 N. Y. 71..... 9
Green v. Frazier, 253 U. S. 233..... 36
Griffiths v. Connecticut, 218 U. S. 563..... 27

H

Hampton v. United States, 276 U. S. 394..... 50
Hawley v. Walker, 232 U. S. 718..... 22
Helfrick v. Dahlstrom M. D. Co., 284 U. S. 594.....9, 34
Heublein v. Wight, 227 Fed. 667..... 19
Highland v. Russell Car, 279 U. S. 253.....29, 30
Holcombe v. Creamer, 231 Mass. 99..... 31
Holden v. Hardy, 169 U. S. 366.....14, 25

J

Jacobson v. Massachusetts, 197 U. S. 11.....15, 16

K

Keokee v. Taylor, 234 U. S. 224..... 26
Knoxville Iron Co. v. Harbison, 183 U. S. 13..... 26

L

Lasson v. Rice, 100 Wash. 642..... 30
Levy Leasing Co. v. Siegel, 258 U. S. 242..... 15
Lilliard v. Oil Paint & Drug Co., 70 N. J. Eq. 197..... 19

M

Miller v. Wilson, 236 U. S. 373..... 22
Minn. v. Barber, 136 U. S. 313..... 16
Missouri Pacific R.R. Co. v. Norwood, 283 U. S. 249..... 15
Mugler v. Kansas, 123 U. S. 623..... 16
Muller v. Oregon, 208 U. S. 412.....15, 22, 48
Murphy v. Sardell, 269 U. S. 530..... 30

PAGE

Mc

McCulloch v. Maryland, 4 Wheat. 316 16
McKinley v. United States, 249 U. S. 397 49
McLean v. Arkansas, 211 U. S. 539 ..... 16, 26

N

National Union Fire Ins. Co. v. Wanberg, 260 U. S. 71 28
Nebbia v. People, 291 U. S. 502 ..... 14, 16, 20, 28, 48
New York Central R.R. v. Williams, 199 N. Y. 108 26
Nichols v. Olympia Veneer Co., 139 Wash. 305 19
Northern Securities Co. v. United States, 193 U. S. 197 16

O

O'Gorman & Young v. Hartford, 282 U. S. 251 ..... 14, 17, 30, 34

P

Panama Refining Co. v. Ryan, 293 U. S. 388 50
Parrish v. West Coast Hotel Co. (Supreme Court, Washington, April 2, 1936) 30
Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345 30
Patterson v. The Eudora, 190 U. S. 169 26
People v. Charles Schweinler Press, 214 N. Y. 395 22
Prentis v. Atlantic Coast Line, 211 U. S. 210 15

R

Radice v. New York, 264 U. S. 292 ..... 15, 22, 48
Ribnik v. McBride, 277 U. S. 350 28
Riley v. Massachusetts, 232 U. S. 671 22

S

St. Louis Iron Mt. v. Paul, 173 U. S. 404 26
State v. Crowe, 130 Ark. 272 30

PAGE

Simpson v. O'Hara, 70 Ore. 261 30
State v. Lange Canning Co., 164 Wis. 228 50
Stetler v. O'Hara, 69 Ore. 519 30
Stevenson v. St. Clair, 161 Minn. 444 30
Strathearn Steamship Co. v. Dillon, 252 U. S. 348 26

T

Texas v. Railway Clerks, 281 U. S. 548 19
Topeka Laundry Co. v. The Court of Industrial Relations, 119 Kan. 12 30
Trustees v. Saratoga Gas Co., 191 N. Y. 123 49

U

United States v. Chemical Foundation, 272 U. S. 1 50
United States v. Grimaud, 220 U. S. 506 49

V

Varney v. Ditmars, 217 N. Y. 223 19
Vernon v. Bethel, 2 Eden 110, 113 29

W

Whitfield v. Ohio (U. S. Supreme Court, March 2, 1936) 20
Williams v. Evans, 139 Minn. 132 30
Wolf v. Court of Industrial Relations, 262 U. S. 522 30

MISCELLANEOUS

Powell: The Constitutional Issue in Minimum Wage Legislation, 2 Minn. L. Rev. 1 28

IN THE

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OCTOBER TERM 1935

No. 838.

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PEOPLE ex rel. JOSEPH TIPALDO,

Appellee.

APPELLANT'S BRIEF ON THE LAW

Statement.

The appeal herein arises out of the granting of a certiorari to the Supreme Court of the State of New York to review the final order in a proceeding on a writ of habeas corpus (R. pp. 2-5, fols. 4-10). The said order, entered on the remittitur of the Court of Appeals (the court of last resort in New York State), sustained the writ of habeas corpus and directed the discharge of the appellee Joseph Tipaldo (R. p. 29, fols. 32, 33). The remittitur of the Court of Appeals certifies as the sole basis for its determination that Chapter 584, Laws of 1933 of New York, "contravenes the 14th Amendment of the Constitution of the United States." The controlling authority is stated to be the decision of this Court in *Adkins* v. *Children's Hospital,* 261 U. S. 525 (R. p. 18, fol. 30). Jurisdiction is had under Section 237(b) of the Judicial Code.

Facts.

Appellee Joseph Tipaldo was indicted November 2, 1934, together with three other persons, charged with forging and altering books and records of the Spotlight Laundry, for the purpose of concealing the failure to pay to female employees the minimum fair wage prescribed in a mandatory order of the Industrial Commissioner of New York State. The order was made pursuant to Article 19, Section 560 of the Labor Law of New York, contained within Chapter 584 of Laws of 1933, known as the New York Minimum Wage Law for Women and Minors. The crime charged is a misdemeanor by virtue of Section 565, subdivision 2 of said chapter.

After his arrest and before trial, Tipaldo sued out a writ of habeas corpus charging as the basis for his application that Chapter 584, Laws of 1933 of New York, contravenes the Fourteenth Amendment of the United States (R. p. 4, fol. 7). The writ was dismissed by Mr. Justice MAY at a Special Term of the Supreme Court on June 26, 1935 (R. p. 7, fol. 14). On appeal to the Court of Appeals, that Court reversed the order at Special Term, sustained the writ and discharged the prisoner Tipaldo (R. p. 18, fol. 30). The final order of the Supreme Court was entered on the remittitur of the Court of Appeals and the certiorari of this Court was issued to review that final order (fol. 35).

The Provisions of the Minimum Wage Law for Women and Minors in New York State (Ch. 584, L. 1933).[1]

Chapter 584, Laws of 1933 of New York, sets up in Article 19 of the Labor Law administrative machinery for determining and enforcing a minimum fair wage for

[1] The text of the statute is found herein as Appendix A, pp. 55-68, infra.

women and minors employed in occupations (except farm labor and domestic service).

In the first section of the Article (Sec. 550), the Legislature states its findings of underlying conditions held to make necessary and proper such an enactment. It is stated that the employment of women and minors at wages "unreasonably low and not fairly commensurate with the value of the services rendered is a matter of grave and vital public concern". The Legislature finds that many women are not as a class in a position to bargain equally with their employers and that as to them the term "freedom of contract" is illusory. Women and minors are forced to accept wages having no relation to the fair value of the services rendered; are peculiarly subject to exploitation by unscrupulous employers, resulting in a constant lowering of standards, constituting destructive unfair competition, reducing the purchasing power of the workers, and threatening the stability of industry. The Legislature determined that these conditions justified and necessitated the exercise of the State's police power.

In Section 551, subdivision 7, "an oppressive and unreasonable wage" is defined as one which is both less than the fair and reasonable value of the services rendered *and* less than sufficient to meet the minimum cost of living necessary for health. This definition is vital. It must be noted that a wage is "oppressive and unreasonable" only when it is less than each of these amounts. A wage is not "oppressive and unreasonable" when it is at least equal to either one or the other of these amounts, whichever is the smaller. It is apparent that it is only a wage lacking in both of these elements which is declared oppressive and that a wage containing either one could not be so held.

Section 552 declares it to be against public policy for any employer to employ any woman or a minor in this State at an oppressive and unreasonable wage as defined in the Article, and makes any such contract of employment void.

Under Section 553, the Industrial Commissioner or the director of the Minimum Wage Division to be set up by the Commissioner is given full power to investigate concerning wages paid to women and minors in any occupation covered by the statute.

Under Section 554, the Commissioner may, on his own initiative, or if petitioned by fifty or more residents of the State, he must cause an investigation to be made to determine whether any substantial number of women or minors in any occupation are receiving *oppressive and unreasonable wages* as defined in Section 551. If such condition is found to exist, a wage board shall be appointed to report upon the establishment of *minimum fair wage rates* for women or minors in such occupation.

If it is found that women are not receiving oppressive wages, that is, wages below *both* the fair value of their services *and* the minimum cost of maintainting health, no action may be taken. It results, therefore, that if women in a particular industry receive the fair value of their services, however far below the cost of living that may be, the Commissioner is powerless to institute any action. If, on the other hand, the Commissioner finds that the women and minors in any occupation covered by the statute are receiving wages sufficient to maintain normal health standards, he has no power to set in motion the wage fixing machinery, however far below the value of the services such wages may be. *In no event, therefore, can a wage be set which will exceed the reasonable fair value of the services rendered.*

Under this section an investigation into the laundry industry was conducted in the months of May and June, 1933, upon the basis of complaints received by the Industrial Commissioner from the New York State Laundry-owners Association and many laundry employees. The reports of this investigation indicate that a substantial number of women and minors in the laundry industry had been receiving oppressive and unreasonable wages as defined in the Act. On July 3, 1933, the Industrial Commissioner appointed a Laundry Wage Board.

Section 555 provides that a wage board shall be composed of not more than three representatives of the employers in the industry in question, an equal number of the employees in such occupation, and not more than three disinterested persons representing the public. The members are appointed by the Commissioner, two-thirds of the members constituting a quorum, and the recommendations or report of the board require a vote of not less than a majority of all its members. Such a wage board is given power to administer oaths and to issue subpoenas to obtain evidence relative to any matters under investigation (subd. 2).

Within sixty days of its organization a wage board must submit a report making recommendations as to minimum fair wage standards for women or minors in the occupation which the board was appointed to investigate (subd. 4). Subdivision 8 of Section 551 defines a fair wage as one fairly and reasonably commensurate with the value of the service or class of service rendered. The things to be considered in establishing a minimum fair wage are set forth to be (1) all relevant circumstances affecting the value of the service or class of service rendered; (2) such consideration as would guide a Court in a suit for the reasonable value of services; and (3) wages paid in the State for work of like character by employers who voluntarily maintain a minimum fair wage standard. Under subdivision 5 of Section 555, employments in any occupation may be classified according to the nature of the service rendered; the minimum fair wage set may vary with localities if the board finds that conditions make such differentiation proper. Under subdivision 6 the board may recommend a suitable scale of rates for learners and apprentices which may be less than the regular minimum set.

The Laundry Wage Board, after investigation, unanimously found that women and minors in laundries in New York State were receiving "unreasonable and oppressive wages" as defined in the Act. It found further

that competition between laundries was met by decreasing the wages of female labor (Factual Brief, pp. 61-63). The board recommended to the Commissioner that a wage scale of 31 cents per hour for the New York City territory and 27½ cents per hour in other parts of the State be adopted for the laundry industry.

Under Section 556 the wage board's report is submitted to the Commissioner who must within ten days confer with the director and accept or reject the report. In the event of rejection, the matter is resubmitted to the same or a new wage board. If accepted, it must be published, together with any proposed administrative regulations which the Commissioner and the director may deem appropriate, and notice must be given of a public hearing to be held not less than fifteen nor more than thirty days after such publ[illegible] at which all persons interested may be heard.

Notice was duly given in the laundry industry and public hearings held. *At these hearings not one representative of any laundry appeared in opposition to the basic wage recommended by the wage board or to the administrative regulations proposed. Such persons as did appear on behalf of laundry owners were all in favor of the adoption of the wage scale and the regulations recommended by the wage board.*

Under Section 557 of the Act, within ten days after the public hearing, the Commissioner must approve or disapprove the report of the wage board. If disapproved, it may be resubmitted to the same or a new wage board. If approved, the Commissioner must make a directory order defining the minimum fair wage rates in the occupation as recommended and including administrative regulations which may include rules for finding and governing learners and apprentices, piece rates or their relation to time rates, overtime or part time rates, other special conditions or circumstances, and may upon the basis of the minimum rates set make such modifications to such rates as the diversities or the complexities of the in-

dustry may require in the classes of cases enumerated in the section.

Under Section 558 licenses may be issued to a woman or minor whose earning capacity is impaired by age, physical or mental deficiency, or injury, authorizing employment at a rate less than the minimum fixed for such time and such amount as shall be fixed by the Commissioner in the license.

Under Section 559 the result of non-observance by an employer of a directory order is the publication of the fact that he has failed to observe the law. A fifteen days' hearing after notice has been provided so that he may show cause why such publication should not be made.

In this case the report of the wage board was approved by the Industrial Commissioner after the public hearing and a directory order became effective on October 2, 1933, notice of which was given to all known laundries in the State.

Section 560 provides that if at any time after a directory order has been in effect for nine months, the Commissioner is of the opinion that non-observance of such order is a threat to the maintenance of a fair minimum wage standard in the occupation, he may give notice of intention to make such order mandatory and of a public hearing to be held not less than fifteen or more than thirty days after such notice, at which all interested persons may be heard. If, after such hearing, the Commissioner still believes that non-observance of the directory order is jeopardizing wage standards, he may make such order or any part thereof mandatory and so publish it.

In the laundry industry, after the directory order had been in effect for nine months, it appeared that many employers were still continuing to pay oppressive and unreasonable wages and imperiling the standards that had been set. Accordingly, on July 2, 1934, notice of an intention to make the laundry wage mandatory and to hold public hearing thereon was published. *At the public*

hearings on the mandatory order, the recommendations of the wage board were again received with unanimous approval by all representatives of the laundry industry that appeared. After the hearings the wages of 31 cents and 27½ cents per hour were made mandatory to become effective on August 6, 1934. Copies of this mandatory order and the administrative regulations attached thereto were mailed to all known laundries in the State, together with instructions for compliance. Since the inception of this action, records of the operation of this mandatory order have become available and an analysis is included in the Factual Brief herewith (pp. 69-75). It shows that the wage fixed is not unreasonable in that the average woman's wage paid has increased to a figure substantially greater than the minimum fixed.

In Section 561 it is provided that after any minimum fair wage order, whether directory or mandatory, has been in effect for a year or more, the Commissioner may on his own motion, and must on the petition of fifty or more residents of the State, reconsider the wage rates set therein and reconvene the same or appoint a new wage board to recommend whether or not the rate or rates in the order should be modified. In such case the report of the wage board shall be dealt with in the same manner as in the case of a first investigation, except that if the order under reconsideration is mandatory in whole or in part, the Commissioner may, in making any new order or confirming the old one, have power to declare to what extent it shall be directory and to what extent mandatory.

Under Section 562 the Commissioner may at any time propose such modifications or additions to any administrative regulations included in a directory or mandatory order as he may deem appropriate to effectuate the purposes of the article, provided only that such changes or additions could legally have been included in the original order. The types of administrative regulations which the Commissioner may make to effectuate an original order are set forth in Section 557. A public hearing must be

held before any such changed or additional regulations become effective.

Section 563 provides "a right to review by the Industrial Board, and the Courts, 'from any ruling or holding on a question of law included and embodied in any decision or order of the commissioner or the director' * * * and upon such review the reasonableness of any rule or order may be challenged. Labor Law, Article 3." [1]

Section 564 requires the keeping of records by employers, that such records shall be open to inspection by the Commissioner or his representatives, and requires the posting of a copy of any minimum fair wage order by any employer subject to it in a conspicuous place in every room in which women or minors are employed.

Section 565 provides the penalty for violations of the Article. It is a misdemeanor for an employer to discharge or discriminate against any employee for serving on or testifying before a wage board or in any other investigation or proceeding related to the Article (subd. 1). Under subdivision 2 it is a misdemeanor for any employer to pay or agree to pay to any woman or minor employee less than the rates applicable to such a woman or minor employee under a directory minimum fair wage order. Under subdivision 3 it is likewise a misdemeanor to fail to keep the records required by the Article or to furnish such record to the Commissioner or his authorized representative upon request.

Section 566 gives to any female or minor worker in an occupation, to which a mandatory minimum fair wage order applies, a right to recover in a civil action the amount of such minimum wages, less any amount actually paid by the employer, and an agreement to work for less than the rate set is no defense to the action. Upon the request of any such employee, the Commissioner may take an assignment of such wage claim in trust for the

[1] Opinion by LEHMAN, J., *People ex rel. Tifaldo* v. *Morehead*, 270 N. Y. 233 at pp. 255, 256; *Helfrick* v. *Dahlstrom Metal Door Co.*, 284 U. S. 594; *Glatzl* v. *Stumpp*, 220 N. Y. 71. Sections 111 and 112 of Article 3 of the New York Labor Law deal with the method of review.

employee and may bring any legal action necessary to collect such claim.

Discussion of Opinion of Court of Appeals.

The opinion of the Court is based upon the alleged controlling force of the decision of this Court in *Adkins* v. *Children's Hospital.* The remittitur of the Court of Appeals certifies that it is the Federal question, the application of the Fourteenth Amendment, which necessarily forms the basis of the decision and that the authority is the *Adkins* case (R. p. 18).

The opinion of the Court finds no "material difference between the act of Congress and this act of the New York State Legislature." This fundamental error is found in the following sentences (270 N. Y. at p. 238):

> "The act of Congress had one standard, the living wage; this State act has added another, reasonable value. *The minimum wage must include both.* What was vague before has not been made any clearer. *One of the elements, therefore, in fixing the fair wage is the very matter which was the basis of the Congressional act."* (Italics ours.)

The italicized lines carry the Court's misconception of the statute. It is a basic misconception. From it flows the erroneous conclusion of the Court of Appeals that there exists no material difference between the two statutes. It ignores the essential underlying difference in failing to appreciate the entire independence of the two concepts of an *"oppressive and unreasonable wage"* as distinguished from a minimum *"fair wage"*. It is the "oppressive" wage that is prohibited as against public policy (Sec. 552).

"An oppressive and unreasonable wage" is defined as a wage which combines two factors: It must be *both* less than the "fair and reasonable value of the services rendered" *and in addition thereto* "less than sufficient to

meet the minimum cost of living necessary for health" (Secs. 551-7).

Those two factors *do not* enter into the determination of the minimum *"fair wage"* as in the statute defined, nor as determined in this case. The only basis for evaluating and arriving at the "fair minimum wage" is the fair value of the services rendered.

The "fair wage" means a wage *"fairly and reasonably commensurate with the value of the service or class of service rendered"* (Secs. 551-8). This definition obviously *does not* contemplate the "cost of living" as a factor. The wage board may take account of: (1) relevant circumstances affecting the value of the service or class of service rendered, (2) considerations that might guide a Court in a suit for value of services, (3) wages for like work in employments where fair wage standards are maintained. These are considerations dealing *solely* with the reasonable value of the services and do not include the "cost of living" factor.

Thus, the Court of Appeals has made a fatal error in holding that the minimum wage set "must include both". The very opposite is the fact. The fair minimum wage, by its very definition and method of calculation, can never exceed the reasonable value of services rendered. Therefore, no matter how much lower than the minimum cost of health maintenance the wage may be, it is nevertheless lawful if it equal the fair value of the services. Therein, too, lies the basic difference in the two statutes. From the failure so to recognize that distinction in underlying theory and practice stems the fallacious conclusion reached by the Court of Appeals. The cases cited as following the *Adkins* decision are in no manner pertinent except insofar as they embody an issue arising out of minimum wage statutes. In every one of those cases cited by the opinion of Chief Judge CRANE, however, the statute sets up a standard identical with that of the District of Columbia statute—all were what we may term "old line" statutes. None of them represents an act comparable to the instant

New York Act; none presents the economic background of the New York Act.

The fair value of services is a quantum meruit determinable by various standards. Courts have long been accustomed to dealing with fair value of services. Economists and scientific cost accountancy have evolved methods of allocating, with results approaching mathematical accuracy, the value of particular services in the ultimate cost or sales value of a product or service. (See Factual Brief, Part VII.) This is therefore no novel nor vague and indefinite standard. When the wage paid a class of workers in an industry is not only lower than the value of the services, but also less than the minimum cost of health maintenance, it becomes an "oppressive", or prohibited and illegal wage.

The minimum cost of health maintenance in a community is also reasonably and accurately determinable. Welfare agencies and public relief agencies have been and are daily administering relief on a bare health maintenance basis which is carefully worked out for public or private expenditure. Thus, we find in the family budget analysis of the New York State Temporary Emergency Relief Administration such a study for relief distribution per person and per family. Thus, too, we find the amount set by private and public agencies in New York City. (See Factual Brief, pp. 32-36.) A research foundation supported by industrialists, employers all, has made such a study and reaches a higher figure than those of the public or private agencies. Be it remembered this is not used in any manner as a standard in fixing the "fair minimum wage". It is used as a *danger signal* to a wage board or to the Industrial Commissioner. If wages are below that limit, there are "oppressive wages" present, *only if* inquiry reveals that the wage is also less than the fair value of the services rendered.

A wage lower than the minimum cost of health subsistence is not an "oppressive wage" if it be the fair equivalent of the value of the services rendered. The

statute does not interfere with the payment of a wage that represents the fair value of the services rendered, *even if* it be lower than the minimum cost of health subsistence. In fact, that is precisely the case at bar. *The minimum fair wage fixed is lower than the cost of living standard.* No better example of the fallacy of the Court of Appeals' decision is needed than this fact. And also—if the wage paid be higher than the cost of health maintenance, even if it be less than the fair value of the services rendered, it is not "oppressive". In such instances the cost of health maintenance acts as a safeguard to the employer. The State's interest in the health and welfare, so far as this statute authorizes enforcement, ceases when it is ascertained that the wages paid are at least equal to the minimum cost of health maintenance.

The "fair minimum wage", on the other hand, is the amount which the wage board is authorized to fix in order to correct oppressive wage conditions when such are found to exist, as above pointed out. It is defined as a wage "fairly and reasonably commensurate with the value of service or class of service rendered." A wage equivalent to the value of services is not "oppressive" even if less than "the cost of health maintenance." A wage equal to the "cost of health maintenance" is not "oppressive" even if less than the fair value of services. It follows that the "fair minimum wage" can never exceed the fair value of services rendered. The "fair minimum wage", indeed, will be below "fair value" where the "cost of health maintenance" is less than "fair value", because a wage which is equal to either of these standards, whichever is the lower, is not "oppressive".

In the instant case, the "fair minimum wage" has been unanimously approved and determined by representatives of the laundry industry as well as by the representatives of the public and workers. No protest has been heard as to its fairness in the public hearings, and none was made in the arguments below. Clearly, the "fair wage" herein set as a minimum has only the value of services as its

basis since it falls below the cost of health maintenance on the basis of the information available to the wage board and public authorities. Thus, in no sense could the so-called "cost of living" factor have entered therein. In both theory and practice, the statute refutes the conclusion of the Court of Appeals and points the distinction between the New York and District of Columbia Acts.

Issue.

The issue here is whether this form of statute under conditions shown presently to exist is a valid exercise of the police power of the State.

The Legislature enacted the Minimum Wage Law as a proper and necessary exercise of the police power of the State of New York (Sec. 550). That power, inhering in the sovereignty reserved to the States, is the measure of the validity of the Act. Many times this Court has said that the Constitution does not prohibit State regulation for the public welfare, but merely conditions the exertion of the admitted power by assuring that the means shall reasonably tend to accomplish the end in a manner neither arbitrary nor capricious. (*Nebbia* v. *New York*, 291 U. S. 502.)

It is well settled that underlying conditions of fact determine the necessities of the public welfare and so condition the validity of legislation. (*O'Gorman & Young* v. *Hartford Insurance Co.*, 282 U. S. 251.) Changing conditions may give validity to regulations which at other times and under other conditions may have been invalid. (*Holden* v. *Hardy*, 169 U. S. 366; *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365.)

The burden of showing a statute to be palpably in excess of legislative power rests on him who assails the exercise of the power. The Legislature is presumed to have acted upon proper grounds. *Missouri Pacific R.R.*

v. *Norwood*, 283 U. S. 249; *Bordens Farm Products* v. *Baldwin*, 293 U. S. 194.

Primarily, it is a legislative function to determine the necessities of the public welfare, and where the constitutional validity of a statute depends upon the existence of facts, the Courts will be cautious about reaching a conclusion contrary to that of the Legislature. (*Radice* v. *New York*, 264 U. S. 292.) Nevertheless, the Courts must be able to see that police power regulations have a real and substantial relation to an existing public evil. (*Jacobson* v. *Mass.*, 197 U. S. 11.) It is in recognition of this duty of the Court that there has been submitted herewith a factual brief which contains a detailed study based upon actual surveys of the conditions underlying the ultimate conclusions of fact stated by the Legislature.[1] From this study the Court may see that the Legislature's determination is one supported by the facts; that its judgment that the Minimum Wage Law is reasonable and necessary for the promotion of the public welfare is founded on experience rather than speculation. It is upon the legislative finding and the facts in support thereof that this Court must determine whether the Minimum Wage Law here under review reasonably promotes the public welfare in a manner neither arbitrary nor capricious.

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[1] Authority for the consideration of such material by the Court may be found in the following cases: *Muller* v. *Oregon*, 208 U. S. 412, reports and opinions from other than judicial sources; *Bunting* v. *Oregon*, 243 U. S. 426, statistics on average hours of labor; *Coty, Inc., of New York* v. *Hearn Dept. Stores, Inc.*, Sup. Ct. N. Y. Co., New York Law Journal, Nov. 26, 1935, books, articles and other literature; *Block* v. *Hirsh*, 256 U. S. 135, matters of common knowledge; *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242, reports of official investigating committees; *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, and *Chastleton* v. *Sinclair*, 264 U. S. 543, the rule that Courts may determine for themselves facts upon which to postulate a rule of law.

POINT I

The New York Minimum Wage Law meets all requirements of due process under the Fourteenth Amendment.

There can be no question that both the employer and the employee are to a certain extent deprived of their liberty to contract by the Minimum Wage Law. But if they are deprived of this liberty according to the established concepts of due process, if the Minimum Wage Law corrects a known and stated public evil, if it promotes the public welfare—in short, if it is a reasonable exercise of the police power—then it is consonant with the Constitution and is a proper exercise of legislative power.

McCulloch v. *Maryland,* 4 Wheat. 316, 421.
Nebbia v. *People,* 291 U. S. 502.
McLean v. *Arkansas,* 211 U. S. 539.

Furthermore, in determining the constitutionality of a statute involving the police power, this Court does not inquire into the wisdom of the policy adopted nor into the economic or social desirability of the legislation. If there is some quantum of reasonableness present in the determination of the Legislature, and unless the act in question is unmistakably and palpably in excess of legislative power, the action of the Legislature is free from objection on constitutional grounds.

Nebbia v. *People,* 291 U. S. 502.
Northern Securities Co. v. *United States,* 193 U. S. 197.
McLean v. *Arkansas,* 211 U. S. 539.
Jacobson v. *Massachusetts,* 197 U. S. 11.
Mugler v. *Kansas,* 123 U. S. 623.
Minn. v. *Barber,* 136 U. S. 313, 320.
Atkins v. *Kansas,* 191 U. S. 207, 223.

O'Gorman & Young v. *Hartford Ins. Co.*, 282 U. S. 251, 257, 258.

It is the contention of the appellant that the Minimum Wage Law operates in a reasonable, fair and practical manner; that the prevention of exploitation of women and minors in industry tends to promote the public welfare; that the means provided bear a real and substantial relation to the objects sought to be attained, as contained in the legislative finding of fact; that it is reasonable for the New York State Legislature to determine that the Minimum Wage Law is economically and socially a desirable solution to the problem of the health and well-being of women in industry and to industry itself, and that the means used would serve the ends sought.

A. The end is legitimate and the means reasonable.

(1) The Assurance of a Fair Wage.

The ultimate end sought by the Legislature is, of course, the promotion of the public good. The immediate end is the establishment of a wage for women and minors which is reasonably and fairly commensurate with the value of the services rendered. The Legislature, in addition, by means of a minimum wage, endeavored to protect industry from the evils of unfair competition which undoubtedly accompany the exploitation of employees by the least conscionable group of employers. No one can quarrel with the legitimacy of the end sought.

The mechanics set up include investigation by the Industrial Commissioner, the inquiry and reports of the Wage Board, the probationary order issued after a public hearing, the trial period for the order, the mandatory order subsequently issued only after another public hearing, the complete power of modification and review, and the determination of the actual wage scale through a process of evaluation of a fair compensation for the service rendered.

Perhaps the most appropriate manner by which to illustrate the actual application of the statute in determining the minimum wage is the finding of the Wage Board for the laundry industry, involved in the present appeal. The Wage Board in the laundry industry found that in May of 1933 sixty-nine percent of the women and minors employed in laundries were receiving a wage of less than $12 per week. The average weekly wage at that time was found to be $10.41. At the same time, the Laundry Wage Board had before it the experience of social welfare and relief agencies in New York State, in respect of the minimum subsistence level and also the minimum cost of maintaining a normal standard of health. The wages paid in the laundry industry were found to be less than *both* the reasonable value of the services performed and the minimum cost of maintaining the health standard. (See pages 32 to 36 inclusive of Factual Brief.) For 1926, the National Industrial Conference Board, Inc. (maintained by employers) found the minimum cost of living for health to be $16.53. The cost of living has declined by 20% from 1926 to 1933. The figure thus determined would be a minimum of $13.21 at the time of the making of the Wage Order for the laundry industry. Taking into consideration the value of the services rendered, as well as the ability of the industry to pay, the Wage Board set a figure of 31 cents per hour in the New York City area, or $12.40 for a forty-hour week, which was considered as the standard for the basic work week.

The wage found for the laundry industry was thus less than the necessary normal health standard for an employed woman and was based solely upon the fair value of the services rendered. The wage set was in accordance with the value conceded by the laundry industry to be fair for the services rendered. In fact, in the Court of Appeals, a representative portion of the laundry industry appeared as *amicus curiae* in support of the Minimum Wage Law and of the laundry wage order.

Thus it must be seen that the standard established by the Legislature, as applied to the laundry industry through the Wage Board, does not use the cost of living standard to raise the minimum wage above what is found to be a fair return for the services rendered.

The use of the standard of reasonable value for the services rendered and the method of determining this reasonable value is one long familiar to the Courts.

> *Heublein* v. *Wight,* 227 Fed. 667.
> *Varney* v. *Ditmars,* 217 N. Y. 223, 228.
> *Nichols* v. *Olympia Veneer Co.,* 139 Wash. 305.
> *Lilliard* v. *Oil Paint & Drug Co.,* 70 N. J. Eq. 197.
> *Cotter* v. *Coatsville Boiler Works,* 257 Pa. 411.

This statutory formula follows the traditional Anglo-American principle of law in applying the standard of reasonableness. It is the practice that has governed the determination of suits on a quantum meruit basis for centuries. It is safe to say that not a day passes but that one of our courts is confronted with some claim by a plaintiff for the reasonable value of services rendered by him to his employer. It is the practice that has guided wage boards for decades in other English-speaking countries with our own traditions of fair play and adequate scope of freedom of contract. The standard is entirely capable of practical application with a very reasonable degree of accuracy. In recent years, in addition to the experiences of our courts, comprehensive analyses of the industrial and economic arts have yielded techniques and devices for appraising the reasonableness of a wage. (See Factual Brief, pp. 76 to 145.)

In *Texas etc. R.R.* v. *Railway Clerks,* 281 U. S. 548, the assurance of a fair wage between the employers and employees on the railroad was held so essential to the maintenance of actual freedom of contract that the Court granted an injunction against an attempted interference

with the provisions of the Railway Labor Act of 1926 (44 Stat. 579 [1926], 45 U. S. C. Supp. VI, Sec. 154 [1932]). That statute provided that labor disputes were to be settled by arbitration between representatives of the employer and the worker. The theory of the Courts is that some form of wage fixing, whether it be through collective bargaining or some other device, is necessary to assure to the interested parties equality of bargaining power. The assurance of a minimum fair wage establishes rather than restricts the freedom of contract.

(2) Elimination of Sources of Unfair Competition.

The legislative determination to attempt, by means of the minimum wage, to protect industry from one source of unfair competition, has a large and familiar foundation in such statutes as the Federal Trade Commission Act, the Clayton Act and the Interstate Commerce Act. These statutes all have as their purpose the elimination of unfair competitive tactics. An employer who regularly pays less than a "fair wage" would have a definite and unfair advantage over his less grasping competitor were it not for the equalizing effect of such a statute (see *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157; *Whitfield* v. *Ohio,* U. S. Supreme Court, March 2, 1936; 56 Sup. Ct. Rep. 532—prohibition on sale of prison-made goods held constitutional as a valid exercise of the State's power to remove a source of unfair competition). The New York statute involved in the case of *Nebbia* v. *People,* supra, is another example of judicial approval of a statute designed to prevent unfair competition and thus assist and indeed save industry.

(3) Minimum Wage Legislation for Women and Minors Has Received General Legislative Recognition.

Statutes which assure the maintenance of a fair wage and the maintenance of a fair price have been, as we have

seen, sustained on the ground that they have saved industry from hardship or injury. The New York Minimum Wage Law preserves this principle of a fair wage and at the same time performs a double function by eliminating one source of unfair competition.

The New York State Legislature is not alone in its findings that minimum wage statutes for women and minors in industry are reasonably adapted to the ends sought to be attained. Minimum wage laws of various types are in existence in sixteen states in this country.[1] In addition, the Governments of Puerto Rico, Great Britain, the Canadian Provinces of Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, Quebec and Saskatchewan, Germany, Mexico, Union of South Africa, Czechoslovakia, Hungary, Uruguay, Spain, Italy, Russia, Chile, Ecuador, Costa Rica, Nicaragua, Cuba, Peru, Australia, New Zealand, Argentina, France and Norway have established minimum wage laws. (See Point VIII—Factual Brief.) With this heritage, can it be said that New York State, by the conditions shown to prevail therein, is not justified in determining that a Minimum Wage Law is reasonably adapted towards the desired goal?

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[1] California—(Hennings General Laws, edition 3 [Hyatt], 1920, Act 2107; Session Laws, 1929, Ch. 256); Colorado—(Compiled Laws, 1921 [published 1922], Secs. 4262-4283, 4329); Connecticut—(Cumulative Supplement to the general statutes: 1931, 1933, Ch. 131a, Secs. 620b-633b); Illinois—(Session Laws, 1933, pp. 597-604); Massachusetts—(Session Laws, 1933, Ch. 308; 1935, Ch. 267); Minnesota—(General Statutes, 1927, Secs. 4033-4034, 4210-4232); New Hampshire—(Session Laws, 1933, Ch. 87); New Jersey—(Session Laws, 1933, Ch. 152); New York—(Session Laws, 1933, Ch. 584); North Dakota—(Supplement to Compiled Laws, 1913-1925, Secs. 396b3, 396b6-396b9, 396b11-396b16; Session Laws, 1935); Ohio—(Session Laws, 1933, pp. 502-510); Oregon—(Session Laws, 1931, Ch. 395; Code, 1930, Vol. 3, title 49, Secs. 303-319); South Dakota—(Compiled Laws, 1929, Secs. 1022a-1022e; Session Laws, 1931, Chs. 173, 174); Utah—(Session Laws, 1933, Ch. 38); Washington—(Pierce's Code, 1929, Secs. 4-3, 4-74, 4-75, 4-77, 4-82; 3526-3547); Wisconsin—(Statutes, 1931, Secs. 20-57, 101.02, 104.01-104.12).

B. The maintenance of the health of women in industry is of deep concern to the State. Where a lack of equality of bargaining power exposes persons to exploitation, legislation to remedy this situation will be sustained.

The social and economic circumstances surrounding the employment of women, affected as they are by physiological considerations, have repeatedly been the basis of judicial statements to the effect that women are in a class by themselves as a special concern of the State. Their health and welfare in the performance of physical labor is held so fundamentally to affect the public welfare and to be so much an object of public interest and concern that legislation designed for their special protection has been sustained even when like legislation for men might not be.

Muller v. *Oregon,* 208 U. S. 412; sustaining Oregon 10 hour law for women.

Riley v. *Mass.,* 232 U. S. 671; sustaining Mass. 54 hour week law for women.

Hawley v. *Walker,* 232 U. S. 718; sustaining Ohio 9 hour per day statute.

Miller v. *Wilson,* 236 U. S. 373.

Bosley v. *McLaughlin,* 236 U. S. 385; the last two cases sustaining the constitutionality of the California statute limiting the labor of women to 48 hours per week.

Radice v. *New York,* 264 U. S. 292, sustaining N. Y. night work statute.

People v. *Charles Schweinler Press,* 214 N. Y. 395.

The changes which our modern industrial system has brought in the economic status of the family have also brought to women growing responsibilities for shouldering the support of others. With their changed economic status it is evident that the earning capacity of women as well

as the physical circumstances surrounding their employment reflect on the health and welfare of themselves, their families and the community as a whole. The tremendous influx of women and minors into industry in New York State in recent years is shown in Charts I and II of the Factual Brief annexed. Other data contained in Part I of that brief indicate the numbers of women employed outside the home, the growing tendency for women to continue working after marriage and the extent to which they must support themselves and others.

As wage earners and family breadwinners thousands of women now share the role traditionally ascribed to men. Women are not in the same position as men, however, as regards their bargaining power and their ability to secure a fair return for their services. It is a matter of common knowledge that women constitute a low wage group in the labor market.

Statistics gathered throughout the United States show that in New York State and indeed in the entire country, in practically every case where women and men are employed in the same occupation, women receive considerably less than men for the same number of hours and the same type of work. In Chart IV of the Factual Brief appended hereto the results of data compiled by the United States Bureau of Labor Statistics on average earnings for men and women employed in the same occupations are set forth. (See Factual Brief, pp. 23-26.) In most of these occupations, as may be seen, the work is primarily light machine labor which may be performed with equal facility by either sex. The reason to which may be ascribed the disparity of wages, and which the Legislature is justified in assuming, is that women are not equally capable with their fellow male workers in driving a fair economic wage bargain. As a further indication of the peculiar inability of women to bargain fairly with unconscionable employers, we have the statistics evidencing the widely varying rates paid to women in the same industry for the same work. (See pp. 19-22 of the Factual Brief.)

There are numerous reasons why women are at a disadvantage in respect to the wage bargain. Tradition doubtless plays an important part, since women's labor has always been regarded as cheap labor, and low wages were long justified on the basis that women worked merely for "pin money". Another factor affecting adversely any real bargaining power of women in industry is that many of their sources of employment are subject to sharp seasonal movements. (See pp. 44-47 of Factual Brief.) It is also common knowledge that women have not been as well informed about conditions in the labor market as are men and that they are less mobile as a labor group. In these respects the low wage level of women has been self-perpetuating. Those who do not earn enough to support themselves must live with their families and be partially supported by others. Their family ties make them unable to move from place to place in search of better opportunities. These women whose earnings are supplemented from other sources are a constant drag on the wage level and offer formidable competition to the growing thousands of women who have no other means of support than their own labor and, in many cases, have others dependent upon them. Low wages cause one of the vicious circles in our modern economic life. The community pays the bill continually, whether directly by supplementing low wages with relief funds or indirectly through the social costs of physical deterioration and poverty.

The lack of trade union organization among women is another important factor affecting their wages. Where such organization exists, there can be no question that it has done much to stabilize the conditions of and wages for work. The union, by collective bargaining, tends to equalize the employee's bargaining power with that of his employer. Women, however, are for the most part unorganized. According to the figures provided by the labor unions themselves (and which are, as a result, in many cases likely to be unduly large), only a small percentage of the one and a half million women gainfully

employed in the State of New York are members of labor unions. Fully half of these organized women are employed in one industry—the manufacture of women's outer clothing. It is interesting to note that in this highly organized industry in New York State the average weekly earnings of women for 1933 were $18.39, as compared with an average of $13.35 for women in all manufacturing industries combined. (See Table XII, Factual Brief.) In the laundry industry, where practically none of the women are organized, women's average weekly earnings were found to be $10.41 at the time of the investigation in May, 1933.

There can be little dispute with the proposition that a worker is entitled legally and ethically to full payment for what he has earned.

> *Adkins* v. *Children's Hospital,* 261 U. S. 525, 558-559.

The legal duty placed upon the employer by this statute is that he must pay women and minor employees the fair value of the services rendered. When the wage equals or is more than the cost of maintaining a normal health standard, the condition of the women in a particular industry ceases to be a menace to public welfare. If within this defined limit an employer pays less than the fair value of the services rendered, by virtue of his more secure and potent economic position, the transaction smacks of fraud, exploitation and over-reaching.

In *Holden* v. *Hardy,* 169 U. S. 366, it was said:

> *"The proprietors lay down the rules and the laborers are practically constrained to obey them. * * * But the fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to a contract shall be protected against himself. 'The State still retains an interest in his welfare, however reckless he*

may be. The whole is not greater than the sum of all the parts and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer.'" (Italics ours.)

Restraints upon the liberty to contract have been declared constitutional in many cases which have involved the contract between the employer and his employee.

Patterson v. *The Eudora*, 190 U. S. 169.
(Prohibition on advance payment to sailors sustained.)
Keokee v. *Taylor*, 234 U. S. 224.
Knoxville Iron Co. v. *Harbison*, 183 U. S. 13.
(Both cases sustaining statutes prohibiting payment of wages in scrip unless redeemable at face amount.)
McLean v. *Arkansas*, 211 U. S. 539.
(Requiring coal to be weighed before screening where wages are based on the weight of coal mined.)
Erie Railroad Co. v. *Williams*, 233 U. S. 685.
New York Central Railroad v. *Williams*, 199 N. Y. 108.
(Both cases holding regulations of time of payment of wages constitutional.)
St. Louis Iron Mt. etc. Ry. v. *Paul*, 173 U. S. 404.
(Sustaining statutory requirement that wages be paid on date of discharge.)
Strathearn Steamship Co. v. *Dillon*, 252 U. S. 348.
(Sustaining regulation on payment of wages to sailors.)

The underlying principle in all these cases is the State's right and indeed its duty to interfere in the terms of a contract between private parties when there is such an inequality in bargaining power that "it is illusory to speak of liberty of contract".

German Alliance Ins. Co. v. *Lewis*, 233 U. S. 389, 417.

These cases have all involved legislation whose purpose it was to protect the right of the worker to what he had earned and to invalidate devices used to avoid honest remuneration. These cases sustain the statutes on constitutional grounds as proper exercises of the police power in spite of the fact that a definite restraint of the liberty to contract had been imposed. **These decisions directly controvert the appellee's contention that he has a constitutionally protected right to use without limit his superior economic position to drive as hard a bargain as he can.** All indicate judicial recognition of the fact that the wage relation is a matter of public concern; that it is a legitimate subject of legislative regulation and that the particular legislative regulation will be sustained if warranted by public necessity, public health or welfare.

Instances in which legislation has directly or indirectly restrained the bargaining power of the more powerful in order to prevent them from enjoying its full economic potency are numerous. In the foreground are cases involving the validity and constitutionality of usury laws.

Griffiths v. *Connecticut*, 218 U. S. 563.
General Business Law (N. Y.), Sections 370-371.

The public purpose served by these usury statutes is the same, i.e., the prevention of contracts which are coercive and unfair. This legislation and the decisions sustaining it declare that it is the better public policy not to have loans made on a basis that is likely to prove ruinous to the borrower. So it is believed that it is better public policy not to have industry conducted on a basis that is likely to prove ruinous to employees. Those who do not get the loans and those who do not get the jobs may suffer for a time, more than if they can borrow on usurious interest, or work for less than the value of the services performed and the sum necessary for subsistence. But the Courts have weighed against these regrettable results the advantages which come to

those whose loans and jobs are on a basis which is fair and consonant with the general public welfare.

See:

Powell: The Constitutional Issue in Minimum Wage Legislation, 2 Minn. L. Rev. 1.

Combinations in restraint of trade have also given rise to legislation and decisions which have as their purpose the protection of the weak from the strong. These statutes and decisions are premised on the same need to control bargaining and competition that underlies minimum wage legislation. It was the lack of any real freedom of bargaining which made the New York Rent Laws valid (*Block* v. *Hirsh,* 256 U. S. 135; *Marcus Brown* v. *Feldman,* 256 U. S. 170), and which justified State fixation of the price of milk (*Nebbia* v. *People,* 291 U. S. 502).

The *Nebbia* case upheld price fixing because there existed a maladjustment materially restricting the regulative forces of competition. (*Ribnik* v. *McBride,* 277 U. S. 350, 360.)

In the *Nebbia* case it was held that one may be compelled to pay a greater sum than that which may be asked because at another end of the industrial scale is found one who may not be paid what his product is worth and who may be unable to bargain freely with those who possess the marketing facilities. In prior cases, the Court has ofttimes frowned upon devices which have restrained competition. But, in the *Nebbia* case, and in the instant case, the statutory devices tend to preserve and promote the competitive system by assuring the parties a bargain on the merits, rather than a bargain with one side compelled to take what is offered.

Standard rates of interest for loans (Sec. 370, General Business Law, N. Y.); regulation of employment agencies (*Brazee* v. *Michigan,* 241 U. S. 340); standardized terms and rates for insurance policies (*National Union Fire Ins. Co.* v. *Wanberg,* 260 U. S. 71; *German Alliance Ins. Co.*

v. *Lewis,* 233 U. S. 389; Sec. 121, Insurance Law, N. Y.); a standard minimum wage in public employment on public projects (*Atkins* v. *Kansas,* 191 U. S. 207)—are all examples of a public interest in private bargains which outweigh the interest of individuals to make their bargains on the best or worst terms that they can get under unrestricted freedom of contract. The deprivation of abstract legal freedom to each individual is deemed less important than the adoption of general standards dictated by the considerations of a wide general policy.

The New York State Minimum Wage Law is in the same tradition. It recognizes that desperate competition for jobs gives an unscrupulous employer power to deprive his employee of what she has fairly earned. The result is another and a most effective means of defrauding the worker and avoiding full payment, and as such can be invalidated as any other scheme having the same effect. The Minimum Wage Law promotes and does not restrict real freedom of contract.

The liberty of contract urged so strenuously by the appellee is merely the liberty of an employer to contract for a wage which is less than the value of the services received, and the liberty of an employee to have the wage forced upon her by the economic compulsion of a crippling necessity.

> "Necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them."
>
> *Vernon* v. *Bethell,* 2 Eden 110, 113.

The Minimum Wage Law, to paraphrase the language of Mr. Justice BUTLER in *Highland* v. *Russell Car etc. Co.,* 279 U. S. 253, 262, merely deprives the employer of the right or opportunity by negotiation to pay less than the fair value of the services rendered.

See also:

Chicago R.R. v. *Wellman,* 143 U. S. 339-346.

The determining test in any case involving the police power is whether or not the public benefit outweighs the resulting burden on individual interests. The "burden" on the employer under the Minimum Wage Law is a requirement that at most he pay to his employees no more than the value of what they have given him. Such deprivation of "liberty" as the employer may urge is really the deprivation of his power to cheat. The Constitution guarantees to no one the right to cheat or to exploit another.

Chicago R.R. v. *Wellman,* 143 U. S. 339-346.
Highland v. *Russell Car,* 279 U. S. 253.
Patapsco Guano Co. v. *Board of Agriculture,* 171 U. S. 345.

C. The Courts have permitted the fixing of wages in industry.[1]

This Court, in *O'Gorman & Young* v. *Hartford Fire Ins. Co.,* 282 U. S. 251, has sustained as constitutional legislation fixing minimum compensation for services performed. The New Jersey statute considered in that case set up a minimum scale of commissions for fire insurance agents.

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[1] Numerous cases involving the constitutionality of minimum wage laws have arisen throughout the United States. In each of the following the statutes were sustained:

Parrish v. *West Coast Hotel Co.* (Supreme Court, State of Washington, April 2, 1936);
State v. *Crowe,* 130 Ark. 272;
Williams v. *Evans,* 139 Minn. 132;
Lasson v. *Rice,* 100 Wash. 642;
Stetler v. *O'Hara,* 69 Ore. 519;
Simpson v. *O'Hara,* 70 Ore. 261.

The cases of *Stetler* v. *O'Hara* and *Simpson* v. *O'Hara,* supra, were affirmed without opinion by an evenly divided court in *Stetler* v. *O'Hara,* 243 U. S. 629.

The cases of *Topeka Laundry Co.* v. *The Court of Industrial Relations* (119 Kan. 12), *Stevenson* v. *St. Clair* (161 Minn. 444), *Wolf* v. *The Court of Industrial Relations* (262 U. S. 522), *Murphy* v. *Sardell* (269 U. S. 530), *Donham* v. *West-Nelson Mfg. Co.* (273 U. S. 657), *Folding Furniture Works* v. *Industrial Commissioner* (300 Fed. 991), decided that the mini-

In *Bunting* v. *Oregon,* 243 U. S. 426, a statute which provided for a ten-hour day for all workers, and in addition that overtime be limited to three hours per day and be paid for on a time and a half basis, was attacked as unconstitutional. That portion of the statute which was violated and under which the case arose was the provision requiring that time and a half be paid for overtime. This Court sustained that statute.

In the case of *Holcombe* v. *Creamer,* 231 Mass. 99, the Massachusetts Court had before it a statute which set up minimum wage standards in industry. The penalty under that statute was similar to the penalty which may be imposed during the nine months' probationary period provided for in the New York statute. This penalty consisted only of the publication of the names of violators of the minimum wage scale set up by the Minimum Wage Board. The Massachusetts Supreme Court held that statute constitutional.

What is regarded as perhaps the leading case on the constitutionality of wage provisions for women is *Adkins* v. *Children's Hospital,* 261 U. S. 525. This Court there decided that the Minimum Wage Law in the District of Columbia was unconstitutional. It will be discussed and distinguished in Point II of this brief.

Legislation compelling employers to pay a wage equal to the value of the services rendered differs only slightly in detail, but not in principle, from other legislation already sustained as constitutional, such as prohibitions

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mum wage laws under consideration were unconstitutional. In each of these latter cases the decision was based upon the authority of *Adkins* v. *Children's Hospital,* 261 U. S. 525.

However, all of the cases cited in this footnote have dealt with the "old line" minimum wage laws, i.e., statutes whose basis of a determination of a wage was a "cost of living" standard, the amount to be paid being determined by the amount required by employees for subsistence. The instant case is the first case before an appellate court in which an attack has been made upon the constitutionality of a minimum wage statute whose basis for the determination of a wage is the fair value of the services rendered.

against the payment of wages in store order or scrip, requirement that coal be screened after weighing, regulations of the time of payment of wages, regulation of employment agencies, usury laws, the New York Rent Law, the New York Milk Law, standardized terms and rates for insurance policies, standard minimum wage laws for public employment and hours of labor statutes for women. The public good to be served by the statutory minimum wage is akin to, if not identical with, the public good served by legislation such as that previously noted.

POINT II

Adkins v. Children's Hospital, 261 U. S. 525, distinguished.

A. The statutes are vitally dissimilar.[1]

Perhaps the fundamental ground of distinction between the instant case and the case of *Adkins* v. *Children's Hospital,* supra, upon which case reliance was placed by the appellee and upon which the Court of Appeals rested its determination, is the difference between the New York statute and the one considered in the *Adkins* case (40 Stat. at L., 960 C. 174, Comp. Stat. Sec. 3421½-A, Federal Stat. Anno. Sup. 1919, p. 234).

The District of Columbia statute provided for a permanent administrative board of three, representing employer, employee and the public. There was a power, similar to that in the New York statute, to hold hearings, investigate, etc. Sub-section 8 gave the Board the power to investigate the wages of women and minors in the different occupations in which they were employed. By sub-section 8 the Board was given power to ascertain and declare standards of minimum wages for women *in any*

[1] Both statutes are printed in full in Appendices A and B, pp. 55-77, infra.

occupation within the District of Columbia, and what wages were inadequate to supply the necessary cost of living to any such women workers. The Board was also given power to set up standards of minimum wages for minors. *If,* under the statute, *it was found that any substantial number of women were receiving wages inadequate* to supply them with the necessary cost of living, *maintain them in health,* and protect their morals, it could, after public hearings, make an order setting a wage to remedy this situation.

The legislative declaration of purpose was set forth in sub-section 23 to the effect that it was *to protect women and minors from conditions resulting from wages which were inadequate to maintain decent standards of living.*

The purpose of the statute in the Adkins case was to guarantee a wage based solely upon the necessities of the workers. The statute did not provide for the wages to have any relationship to earning power; was applicable to all vocations and not to the character of the work; was exclusively a price-fixing statute, having as its basis the "vague, variable standard" of the "cost of living"; had no relationship between the wage set and the work done, and did not consider the industry's ability to pay.

As contrasted with this statute, the New York Minimum Wage Law provides a definite standard for wages to be paid. *The worker is not to be paid more than the value of the services rendered* (Secs. 551-8, 552). This minimum wage is fixed after consideration of all relevant circumstances and of the principles that would guide a Court in a suit for the reasonable value of services rendered (Secs. 551-8). In each industry there must be a separate investigation conducted by a separate Board. The purpose of the New York statute is to prevent the exploitation of women and children in industry, to eliminate one source of unfair and cut-throat competition, but does not require the employer to pay more than the value of the services rendered.

The New York statute has a nine months' trial period in which the effect of the application of the statute to a particular industry may be adequately observed and measured. Modification after the wage order for each industry has been in operation for a year or more is amply provided for (Sec. 561).

The New York Act amply safeguards the interests of the employer. In the "cost of living" statute, such as that in the District of Columbia, the employer has to pay an amount necessary for subsistence, whether or not the services rendered by his employees are worth that sum. In the laundry industry to which the order under consideration in this appeal was applied, the minimum value of the services, after a consideration of the amount paid to others in the same industry, and the statutory standards, was found to be $12.40 for the standard work-week. This value was approved by the industry's representatives and the industry as a whole.

Under a statute such as the District of Columbia statute, the wage in the instant case would have been at least $13.21 per week, the minimum amount for health maintenance. (Factual Brief, pp. 33-36.)

The New York statute specifically sets up for the purposes of appeal as to the reasonableness of any determination of a wage board the entire machinery of Article 3 of the Labor Law.[1] There is thus provided for all questions arising under the statute an appeal to the Industrial Board, and in the event of an affirmance by the Board, an appeal to the Courts.

B. Underlying questions of fact condition legislation.[2]

The ever increasing number of women seeking employment in New York State over a period of years, their growing responsibility as breadwinners on the one hand,

[1] See Sections 111, 112 of Article 3 of the New York Labor Law and *Helfrick* v. *Dahlstrom Metal Door Co.*, 284 U. S. 594.

[2] *O'Gorman & Young* v. *Hartford Fire Insurance Co.*, supra.

and their increasing insecurity as the most disadvantaged class of wage earners in an unstable industrial system on the other, has been pointed out in the Factual Brief submitted herewith. (Factual Brief, Charts I to III, pp. 1-37.)

Insecurity, low wages and their concomitant evils are by no means new problems. The depression, however, has focused public attention on the evils of unemployment and low wages and has brought about a clearer recognition of the fact that a maladjustment in any one sphere of our economic organization brings increasingly wider repercussions. The expansion of the business structure, intensified competition, mechanization and technological changes—these and many other factors have increased the instability of industry and with it the insecurity of the wage earner.

The tremendous influx of women and minors in industry in New York State in recent years may be seen in Charts I and II in the Factual Brief. (See also Factual Brief, pp. 1, 2.) There has, furthermore, been a growing tendency for women to remain a permanent factor in industry rather than to be the temporary factor of past years. Statistics indicate that women now more than ever continue working after marriage. (Factual Brief, pp. 2-18.)

In *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, this Court said:

> "Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. * * * In a changing world, it is impossible that it should be otherwise."

Another controlling factor which sharply differentiates the situation presented to the Court in the *Adkins* case from the one presented in this case is the number of wage earners affected. In 1923 there were roughly 17,000

female and minor workers in the very restricted scope of businesses in the District of Columbia. In the present case, the number of women engaged in industry in the State of New York is roughly one and a half million—15 percent of its entire population—and in the laundry industry alone, 22,000. When considering the great variety of industries in New York State in which women are employed, an entirely different social and economic basis is presented.

See *Green* v. *Frazier,* 253 U. S. 233.

C. The opinion of this Court in Adkins v. Children's Hospital sustains the validity of the New York minimum wage statute.

The differences in the underlying facts and in the statutes, of themselves, are sufficient to make the rule of *Adkins* v. *Children's Hospital* inapplicable to the case herein. Furthermore, the New York statute under consideration meets the objections made by this Court to the District of Columbia Minimum Wage Law. The New York Minimum Wage Law measures up to the affirmative standards for minimum wage laws indicated in the opinion in the *Adkins* case.

The objections found by this Court to the District of Columbia statute, as expressed in the opinion in the *Adkins* case, are:[1]

1. "The price fixed by the board need have no relation to the capacity or earning power of the employee, the number of hours which may happen to constitute the day's work, * * * " (p. 555).

The New York Minimum Wage Law expressly limits the "fair" wage to the value of the services rendered after a consideration of all the pertinent factors entering thereinto. (Secs. 551, subds. 7 and 8; 552.)

[1] Italics used herein are our own for emphasis. The [redacted]tations are all from the opinion of Mr. Justice SUTHERLAND in the *Adkins* case.

The distinction is clear. The New York Minimum Wage Act meets the first objection found in the *Adkins* decision.

> 2. "It is based *wholly* on the opinions of the members of the board and their advisers * * * as to what will be necessary to provide a living for a woman, keep her in health and preserve her morals" (p. 555).

The New York Minimum Wage Law bases the fair wage upon studies made to ascertain the value of the services rendered in each industry where oppressive wages are found to exist in substantial measure, and the said fair wage is not based on the cost of the maintenance of health as such. (Secs. 551, subd. 8; 552.) In the District of Columbia statute a single permanent administrative board was established for all industries affected. In the New York statute a different wage board for *each* industry is provided.

No such criticism as found in this instance by the opinion of the *Adkins* case can possibly be levied against the New York statute, which thus meets the second objection to the District of Columbia statute.

> 3. "It applies to any and every occupation in the District, without regard to its nature or the character of the work" (p. 555).

Here, again, we find a vital distinction in which the New York statute fully meets the objection of this Court. The District of Columbia Minimum Wage Law, setting only one standard—the cost of living and maintenance of morals—was applicable uniformly to all industries throughout the District. It was naturally, as a result of the very language of the statute, one of general application throughout a geographic area in which conditions of living were at least in some degree alike. The New York statute, on the contrary, can only be applied

to those industries individually wherein an individual study of conditions prevailing reveals that in the light of the character of the work done, in consideration of the value of the services, there is paid in said industry in substantial measure a wage which is both lower than the fair value of the services rendered and also less than the minimum cost of health subsistence. (Secs. 551, subd. 7; 554-560.)

The New York statute is, therefore, not uniformly applicable to all industries with the fixation of one minimum wage. The rate is set for each industry considered by itself and must therefore be applied to each industry with particular regard to the conditions and the value of the services therein.

4. "The standard furnished by the statute for the guidance of the board is so vague as to be impossible of practical application with any reasonable degree of accuracy" (p. 555).

Contrast this conclusion, applicable to the District of Columbia statute, with the clear and unambiguous standard laid down in the New York Act. We have as the standard of the fair wage the value of the services rendered, and that only. (Sec. 551, subd. 8.) The cost of living is not the basis for the fixation of the fair minimum wage. The cost of living or health maintenance acts only as a jurisdictional feature—giving the Industrial Commissioner the right to appoint a wage board in the industry.

There have been indicated well established methods for ascertaining the value of services rendered in relation to the work or produce resulting from such services. Studies in cost allocation—cost accountancy, cost of commodity production, etc., are factors determinable in many instances with almost mathematical exactitude. The estimation of such values is well known to the Courts. The value of the work on a product or a part thereof can be ascertained in relation to the total cost of production by various methods. (Factual Brief, Part VII.)

Suffice it to state that in the instant case of the fixing of the basic minimum fair wage for the laundry industry, not a single voice has been heard in the entire industry to claim that the wage fixed does not represent at least the minimum fair value of services rendered. Thus the New York statute and the manner of its application herein meet the objection to the *Adkins* case statute in respect of the standard on which the wage is based.

> 5. "*The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling* him to pay not less than a certain sum, not only whether the employee is capable of earning it, *but irrespective of the ability of his business to sustain the burden,* * * *" (p. 557).

Here we meet the salient objection found to invalidate the District of Columbia act in the *Adkins* case. Here too we note the basic distinction in the New York statute. Both employer and employee, both the value of the services and the conditions in the industry, are vital to a determination of the minimum fair wage under the New York Act. The employer is considered because he can never be required to pay more than the fair value of the services rendered. And the very basis of the fair wage is the capacity for earning it, the value of the services rendered by the worker. (Secs. 551, subd. 8; 561.)

The ability of the industry in this instance to sustain what may be termed, erroneously, the burden is more than amply indicated by the unanimous support of the industry and the results obtained within the industry before the mandatory order even became effective. All the factors, therefore, deemed vital in the opinion of Mr. Justice SUTHERLAND in the *Adkins* case are found within the New York Act.

> 6. "It takes no account of periods of stress and business depression, of crippling losses, which may

leave the employer himself without adequate means of livelihood" (p. 557).

The New York Minimum Wage Law permits of modification to meet changing conditions, provides for studies and for every reasonable means of guarding against unreasonable provisions. Under the machinery of the New York statute, review of the wages found with relation to the value of services, etc., and reconsideration in the light of conditions which may be found to exist thereafter are provided. (Secs. 561, 562.)

While no such accuracy is possible with one standard from outside of the industry, such as a *cost of living* basis, unrelated to the industrial factors, as was the case in the District of Columbia statute, the contrary is true in the New York Act where the standard fixed for the determination of the wage finds its basis in the conditions prevailing in each industry as a separate entity.

7. "To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, * * *" (p. 557).

No such objection as this can possibly be raised to the New York Minimum Wage Law in the light of its express language restricting the minimum fair wage to the measure of the fair value of the services rendered. The moment that it is ascertained that the wage paid is not less than the fair value of the services, the authority of the board to fix any other or higher wage ceases. The moment the wage paid is ascertained to be not less than the minimum cost of health maintenance, the interest of the State, insofar as fixing any other wage standard, necessarily also ceases. Thus, the New York Act prohibits only an "oppressive" wage; a fraud upon the worker; a wage which is both less than the fair value of the services rendered and lower than the cost of health maintenance (Sec. 552).

8. "The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract, or the work the employee engages to do" (p. 558).

If we be permitted to paraphrase, in the light of the New York Minimum Wage Law, the above language of the opinion in the *Adkins* case, we might with full justice state, "the feature of this (the New York) law which perhaps more than any other puts upon it the stamp of constitutional validity is that it exacts from the employer no more than the reasonable value of the services rendered, a basis solely related to his business, to the contract, and to the work which the employee engages to do." Thus, finally, do we find met in the New York statute the last objection contained in the opinion of this Court in the *Adkins* case. In every instance the New York Minimum Wage Law meets the objections of the Court.

We now pass to affirmative standards which may be said to be required of such a statute, as found in the opinion of this Court in the *Adkins* case.

1. "The ethical right of every worker, man or woman, to a living wage may be conceded. One of the declared and important purposes of trade organizations is to secure it" (p. 558).

Under the New York statute, the minimum fair wage to be fixed can never be *higher* than what was conceded to be the ethical right of every worker. It may *equal* the so-called "living wage". In many cases, as in the instant case, it is even lower than that "ethical right".

2. "And with that principle and with every legitimate effort to realize it in fact, no one can quarrel" (p. 558).

The New York Minimum Wage Law takes but a small step in this appropriate direction. Since the law is only intended to protect from an oppressive wage, partaking of the element of fraud and economic duress, it cannot be said that the standard of the New York statute is either unreasonable or arbitrary. It is, therefore, within the precise language of the *Adkins* case, a "legitimate effort" to realize the end there held to be appropriate. Neither does the New York statute assume the "fallacy", that employers are bound at all times to furnish this cost of living. The New York statute merely forbids a wage less than the value of the services, and then only when such wage is also less than the minimum cost of health maintenance.

3. "The moral requirement implicit in every contract of employment, viz: that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored" (p. 558).

Again may we be permitted to paraphrase to bring out the distinction in the New York statute—"The moral requirement implicit in every contract of employment is here completely fulfilled." It is fair value of the services rendered. We achieve the consummation desired by the opinion in the *Adkins* case—"the just equivalence" of the wages and the services rendered.

*The liberty which the appellee herein claims to be deprived of is the liberty to ignore that "moral requirement implicit in every contract * * * of just equivalence."*

4. "Certainly the employer by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty" (p. 558).

The New York statute does not require that he pay any more than the minimum fair value or equivalent of the services rendered.

5. "A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, *to pay the value of the services rendered,* even to pay with fair relation to the extent of the benefit obtained from the service [redacted] would be understandable" (p. 559).

The New York Minimum Wage Law does no more than this. In fact, the statute does not go so far as the last qualification. The New York Act stops with the minimum fair value of the services rendered. Even this permitted aim we do not attain under the New York statute unless the wage paid is also lower than the minimum cost of health maintenance. The standard fixed in the New York law is, therefore, within the "understandable" limitations indicated by the decision in the *Adkins* case.

6. "We have been furnished with a large number of printed opinions approving the policy of the minimum wage, and our own reading has disclosed a large number to the contrary" (p. 559).

We submit in this case a thorough analysis of the background of the statute enacted by the New York Legislature—an analysis dealing with the position of women in industry in the State of New York in relation to the wages received, in comparison with like wages for identical work received by others—in relation to the separate industries in which women are largely engaged—a detailed study of the industry affected and out of which this litigation arose.

Emphasis is not placed by the appellants herein upon opinions of observers or students of the subject, however "mildly persuasive" they may appear to be. We place our emphasis rather upon the compelling accumulation of factual material establishing: (1) the need for protecting women in industry in New York State from overreaching and exploitation by employers in certain industries; (2) the inability of the laundry industry and others to maintain voluntary fair minimum wages because of

destructive competition which threatens the stability of those industries. These facts were all available to the Legislature of New York and it is respectfully submitted they amply support the statute before the Court.

Thus, we find for every objection offered by this Court in the *Adkins* case a complete answer in the New York statute; for every affirmative qualification indicated—a standard in the New York Minimum Wage Law which meets this qualification. It may be stated with confidence that the majority opinion in *Adkins* v. *Children's Hospital*, supra, furnishes the fullest justification for declaring the New York Minimum Wage Law a valid enactment under the Fourteenth Amendment.

The *Adkins* case discussed the statutes and decisions previously cited herein (pp. 26, 27, infra) and whose purpose and tendency it was to prevent unfair and fraudulent methods in the payment of wages. These cases were cited with approval, but distinguished (p. 547, *Adkins* case). Those decisions may not have been applicable in the *Adkins* case, but they are directly in point in any consideration of the New York statute, whose purpose is akin to the statutes sustained in those cases.

In discussing the decisions relating to hours of labor, this Court held them inapplicable in the *Adkins* case by saying that the statutes involved were limited to certain occupations. Similarly, the New York statute applies only to those occupations where the evils of "unreasonable and oppressive wages" are found to exist.

In the *Adkins* case, the Supreme Court considered the time not yet ripe for a consideration of the economic valuation of the Minimum Wage Law. The Court said:

> "No real test of the economic value of the law can be had during periods of maximum employment, when general causes keep wages up to or above the minimum; that will come in periods of depression and struggle for employment when the efficient will be employed at the minimum rate while the less capable may not be employed at all" (p. 560).

That language was written in 1923. In the years of "depression and struggle for employment", the employer, seeking to gain a competitive advantage, has been quick to seize upon the use of an oppressive wage in those industries where women, employed in large numbers, have been unable to stand upon an equal footing in bargaining. The time for an evaluation of the Minimum Wage Law, as indicated by this Court, has come.

D. The New York Minimum Wage Law in operation.

Earlier in this brief (pp. 17-21) we discussed the rational relation between the means set up and the ends sought to be attained by the Minimum Wage Law. In this connection, analysis of the actual results and effects of the Minimum Wage Law, as applied to the laundry industry, is extremely persuasive in any evaluation of the legitimacy of the end and the reasonableness of the means.

In 1926 a survey of women's wages in laundries showed that earnings for a full work week ranged from less than $5 a week in some laundries to more than $35 a week in others. The average earnings were $14.67. In 1929, coincident with the increase in business prosperity, wages had risen somewhat. At about that time the Laundry Board of Trade attempted to establish a minimum wage of $15 a week for women, but this attempt failed. (See pp. 48-57 of Factual Brief.)

A survey conducted in 1931 indicated that wages had dropped below the 1926 level. By 1933 the continued price-cutting made possible by the payment of unreasonably low wages resulted in such a chaotic condition in the laundry industry that the Laundryowners Association and affiliated organizations supported and urged the passage of the State Minimum Wage Law.

In 1933 the laundry industry in New York State employed over 22,000 women and minors. The investigation

of laundries in May of 1933 showed that the average weekly earnings of women at that time were $10.41. In November, 1933, after the directory wage order had been in effect for one month, the average weekly earnings of women and minors in all laundries had increased to $12.12, or 16 percent. This increase in weekly earnings is even more significant when related to the hours worked, for the average working week was 45 hours in May and had decreased to 40 hours in November. By November of the next year (1934) three months after the mandatory wage order became effective, the average weekly earnings of women and minors in the laundry industry had further increased to $13.17, and a year later, in November, 1935, to $13.42. Thus, the average weekly earnings of women laundry workers increased 29 percent between May, 1933, and November, 1935. Although the period from 1933 to 1935 was one of rising prices and increasing wages throughout industry, these wage increases for women in the laundry industry were far greater than those for women employed in industry as a whole in New York State. (See pp. 71-72 of Factual Brief.)

There has been no discernible tendency for the minimum wage to become the maximum as a result of the wage order, or for the wages of the higher paid employees to be reduced. (See Factual Brief, pp. 69-75.) Under the directory order, 31 percent of the women and minors employed in the industry were receiving wages higher than the prescribed minimum; under the mandatory order (November, 1935) 42 percent were being paid more than the minimum rates. The remainder were paid at minimum rates excepting employees of those violating the order. Such a result is in harmony with the purposes of the law and clearly illustrates the proper application of its principles to the laundry industry. Here the work of women is largely routine and unskilled; the minimum fair wage fixed by the Board represented the minimum fair return for the services of the least skilled group. The wage order has prohibited the employment of women

at wages below that minimum; it has not operated to prevent the more skilled or efficient workers from securing a higher return for their services, *above* the minimum. Nor has the increased wage resulted in the replacement of women by men in the industry. In 1935, as in 1933, women formed 60 percent of the employees in New York State laundries.

That the industry was well able to absorb the wage increases effected by the mandatory order is seen from the fact that 94 percent of the laundries throughout the State were complying with the terms of the mandatory order in November, 1935; 58 percent were paying more than half their women and minor employees wages higher than the established minimum rates. The large number of laundries paying sums in excess of the minimum rates seems clearly to indicate that the wage ordered was reasonable and was not in excess of the value of the services performed.

The New York statute is utterly different from the one considered in the *Adkins* case, and contains the very provisions whose absence was condemned in that decision. There exist in New York State the social and economic conditions recognized by the Supreme Court as reasonable bases for a minimum wage statute but found to be lacking in that case.

With these differences between the statutes, and the facts underlying them, by the very reasoning in the Adkins case, a different result must be reached here.

It is of the essence of Anglo-American law and particularly of constitutional decisions thereunder that the Courts decide only specific cases, presented by specific records, and involving definite issues before the Court. This Court also does not decide general issues or pass upon all legislation of like character, or designed to meet similar conditions, when a specific example of such legislation, operating within a single jurisdiction and relating to specific facts, is involved in a case before it. It cannot be said that the United States Supreme Court in the

Adkins case holds that all minimum wage statutes, wherever found, are unconstitutional. On the contrary, the method of the District of Columbia statute was decried—but not its purpose. The purpose, in fact, was commended. (*Adkins* v. *Children's Hospital*, at p. 558.)

This canon of constitutional interpretation is particularly compelling when dealing with the broad language in the Fourteenth Amendment. The so-called "police power," which is the real issue in this case, raises, as the Courts have indicated again and again, ultimately pure questions of fact.

The Fourteenth Amendment has never been considered self-defining. It expresses a compromise between the liberty of the individual and the welfare of the people of the State. Every case under the Fourteenth Amendment presents an individual instance which varies with the facts.

Muller v. *Oregon*, 208 U. S. 412, 420, 421.

In *Nebbia* v. *People*, 291 U. S. 502, Justice ROBERTS, discussing the police power in relation to the Fourteenth Amendment, said:

> "It results that a regulation valid for one sort of business, or in given circumstances may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

See also *Radice* v. *New York*, 264 U. S. 292.

Compare *Block* v. *Hirsh* (256 U. S. 135) with *Chastleton* v. *Sinclair* (264 U. S. 543).

It is the appellant's contention in this case that the *Adkins* case passed on and purported to pass on only the legislation which was before it and the economic conditions upon which that legislation was founded. The *Adkins* case passed upon the District of Columbia statute in view

of the circumstances disclosed in regard to that statute, and did not consider nor purport to consider, and therefore did not pass upon, other minimum wage laws with different factual backgrounds. A different case and a different statute are now before this Court.

POINT III.

The delegation of powers to the Wage Board and to the Industrial Commissioner, as contained in the Minimum Wage Law, is a proper exercise of legislative authority.

Although the question as to the propriety of the delegation of legislative power to the Wage Board and to the Industrial Commission has not been raised by the writ of habeas corpus, it will nevertheless be dwelt upon briefly.

The problem of the extent to which legislative power may be delegated to administrative officers and bodies resolves itself into a consideration of the limits within which, in view of the increasing complexity of subject-matter, legislative bodies can practically determine administrative duties without impairing the efficient execution of a statute and without imposing too detailed a task upon themselves.

Trustees, etc. v. *Saratoga Gas Co.*, 191 N. Y. 123.

The delegation of legislative powers is declared valid where the Legislature has defined the general policy as far as is reasonably possible, and has left to the administrative body only the adaptation of such policy to varying local conditions or to peculiar exigencies with which the latter is better equipped to deal.

McKinley v. *United States*, 249 U. S. 397.
United States v. *Grimaud*, 220 U. S. 506.

United States v. *Chemical Foundation,* 272 U. S. 1.
Hampton v. *United States,* 276 U. S. 394.
Panama Refining Co. v. *Ryan,* 293 U. S. 388.

Especially in cases where contact with local conditions is requisite, such delegation is frequently declared valid.

State v. *Lange Canning Co.,* 164 Wis. 228.

In the case just cited, the legislative delegation of power to an administrative body to regulate the hours and working conditions of women employees was held proper.

In *Panama Refining Co.* v. *Ryan,* supra, Chief Justice HUGHES said:

> "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality which will enable it to perform its function in laying down policies and establishing standards while leaving to selected instrumentalities the making of subordinate rules within prescribed limits of the determination of powers to which the policy as declared by the legislature is to apply. Without capacity to give authorization of that sort, we should have the anomaly of a legislative power which in many circumstances calling for its assertion would be but a futility."

The Legislature, in the Minimum Wage Law, attempted to provide for the public welfare by securing a fair wage to women and minors in certain occupations, and the protection of industry from one source of unfair competition. This policy is clearly and unequivocably expressed (Sec. 550). The Legislature went further and established standards for carrying into effect their declared policy. Before the Wage Board may commence an inquiry into working conditions in certain industries, it must first be found that

a substantial number of the women and minors engaged in such an occupation are receiving oppressive and unreasonable wages, as defined in Section 551 of the statute.

The Wage Board can establish a wage only upon the application of the standards set forth in Section 551, subdivision 8, and Section 555. The limited powers of the Wage Board and of the Industrial Commissioner are clearly defined. Although the language of the statute is permissive in that the Commissioner and the Wage Board *may* take into account the type of evidence required by the Legislature, the Courts have construed this permissive language to be mandatory.

Dunham v. *Ottinger,* 243 N. Y. 423.

In that case, Chief Judge Hiscock said:

> "While the language of the statute confers upon him a permissive privilege to do these things there is no doubt that it imposes upon him the mandatory duty to perform them and thus protect the public" (p. 432).

It would be obviously impractical, if not impossible, for the Legislature to institute an investigation into the various industries in which women and minors are employed, and to establish minimum wage standards in each industry. To do so would be to "impair the efficient execution of the statute and to impose too detailed a task upon themselves." To safeguard against this, the Legislature has been definite and detailed in its adaptation of its legislative policy to the varying economic and industrial conditions and to the peculiar exigencies with which the Wage Board and the Industrial Commissioner are best equipped to deal.

POINT IV

The contention of the relator that the Minimum Wage Law is unconstitutional, in that it operates to compel him to be a witness against himself in a criminal case, is not relevant to the decision on this petition.

In order for the relator successfully to set up the constitutional right against self-incrimination, it is elementary that he must first show that he is affected by the particular provision.

In the first place, there is no showing in the relator's petition that the evidence by which the People have secured his indictment was secured in any illegal manner or by books and records obtained by reason of the provisions of the Minimum Wage Law. The indictment which charges the relator with the crime of forgery is certainly not governed by the provisions of law contained in the minimum wage statute.

Furthermore, the relator has made no showing that the evidence in the possession of the People has been illegally obtained or is being used against him.

The relator states in his petition that he was a *manager* of the Spotlight Laundry, in the County of Kings. If the books of the Spotlight Laundry were used as evidence against the relator, these books not being the relator's, he is not being compelled to be a witness against himself.

Aside from these considerations, Section 567 of the Minimum Wage Law provides that if any of the provisions of this Article are held invalid, the remainder of the Article shall not be affected thereby. The rules of statutory construction are that the invalidation of one part of a statute affects the other part only where the two are so interrelated that one cannot exist without the other.

It is apparent that the setting of a minimum wage standard is not affected by the requirement that certain books and records be kept and displayed. The statute would not fail of its purpose if these sections had been omitted.

POINT V

The statute being valid under the Fourteenth Amendment of the Constitution of the United States, the writ of habeas corpus should be dismissed and directions issued accordingly from this Honorable Court.

Respectfully submitted,

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APPENDIX A

Chapter 584—Laws of New York—By Authority.

AN ACT to amend the labor law, in relation to the determination and establishment of minimum fair wage standards for women and minors, with provision for the imposition of penalties for the violation thereof.

Became a law April 29, 1933, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter fifty of the laws of nineteen hundred twenty-one, entitled "An act in relation to labor, constituting chapter thirty-one of the consolidated laws," is hereby amended by inserting therein a new article, to be article nineteen, to read as follows:

ARTICLE 19

MINIMUM FAIR WAGE STANDARDS FOR WOMEN AND MINORS

Section 550. Factual background.
551. Definitions.
552. Contracts of employment void as against public policy.
553. Investigatory powers.
554. Power and duty of commissioner to appoint wage board.
555. Constitution of wage board.
556. Report of wage board.
557. Action of the commissioner on report of wage board.
558. Special licenses.
559. Publicity.

560. Commissioner's power to make orders mandatory.
561. Reconsideration of wage orders.
562. Reconsideration of administrative regulations.
563. Right of review.
564. Records and notices required of employers.
565. Penalties.
566. Recovery of wages.
567. Construction.

Section 550.* The employment of women and minors in trade and industry in the state of New York at wages unreasonably low and not fairly commensurate with the value of the services rendered is a matter of grave and vital public concern. Many women and minors employed for gain in the state of New York are not as a class upon a level of equality in bargaining with their employers in regard to minimum fair wage standards, and "freedom of contract" as applied to their relations with their employers is illusory. Since a very large percentage of such workers are obliged from their week to week wages to support themselves and others who are dependent upon them in whole or in part they are, by reason of their necessitous circumstances, forced to accept whatever wages are offered them. Judged by any reasonable standard, wages are in many cases fixed by chance and caprice and the wages accepted are often found to bear no relation to the fair value of the service rendered. Women and minors employed for gain are peculiarly subject to the overreaching of inefficient, harsh or ignorant employers and under unregulated competition where no adequate machinery exists for the effective regulation and maintenance of minimum fair wage standards, the standards such as exist tend to be set by the least conscionable employers. In the absence of any effective minimum fair wage rates for women and

* So in original. [Section heading omitted.]

minors, the constant lowering of wages by unscrupulous employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers and threatens the stability of industry. The evils of oppressive, unreasonable and unfair wages as they affect women and minors employed in the state of New York are such as to render imperative the exercise of the police power of the state for the protection of industry and of the women and minors employed therein and of the public interest of the community at large in their health and well-being and in the prevention of the deterioration of the race. In the considered judgment of the legislature this article is constitutional.

§ 551. Definitions. As used in this article:

1. "Commissioner" shall mean the industrial commissioner.

2. "Director" shall mean the director or any deputy director of the minimum wage division, which shall be set up as a separate division in the department of labor by the commissioner with a director in charge and with such deputy directors and other assistants and employees as the commissioner may deem desirable.

3. "Wage board" shall mean a board created as provided in section five hundred and fifty-five of the article.

4. "Woman" shall mean a female of twenty-one years or over.

5. "Minor" shall mean a person of either sex under the age of twenty-one years.

6. "Occupation" shall mean an industry, trade or business or branch thereof or class of work therein in which women or minors are gainfully employed, but shall not include domestic service in the home of the employer or labor on a farm.

7. "An oppressive and unreasonable wage" shall mean a wage which is both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health.

8. "A fair wage" shall mean a wage fairly and reasonably commensurate with the value of the service or class of service rendered. In establishing a minimum fair wage for any service or class of service under this article the commissioner and the wage board without being bound by any technical rules of evidence or procedure (1) may take into account all relevant circumstances affecting the value of the service or class of service rendered, and (2) may be guided by like considerations as would guide a court in a suit for the reasonable value of services rendered where services are rendered at the request of an employer without contract as to the amount of the wage to be paid, and (3) may consider the wages paid in the state for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards.

9. "A directory order" shall mean an order the nonobservance of which may be published as provided in section five hundred and fifty-nine of this article.

10. "A mandatory order" shall mean an order the violation of which shall be subject to the penalties prescribed in paragraph two of section five hundred and sixty-five of this article.

§ 552.* It is hereby declared to be against public policy for any employer to employ any woman or minor in an occupation in this state at an oppressive and unreasonable wage as defined in section five hundred and fifty-one of the article and any contract, agreement or understanding for or in relation to such employment shall be null and void.

* So in original. [Section heading omitted.]

§ 553.* The commissioner or the director or any authorized representative of the director shall have full power and authority:

1. To investigate and ascertain the wages of women and minors employed in any occupation in the state;

2. To enter the place of business or employment of any employer of women and minors in any occupation for the purpose of examining and inspecting any and all books, registers, payrolls, and other records of any employer of women or minors that in any way appertain to or have a bearing upon the question of wages of any such women or minors and for the purpose of ascertaining whether the orders of the commissioner have been and are being complied with; and

3. To require from such employer full and correct statements in writing when the commissioner or the director or any authorized representative of the director deems necessary, of the wages paid to all women and minors in his employment.

§ 554.* The commissioner or the director shall have the power, and it shall be the duty of the commissioner on the petition of fifty or more residents of the state, to cause an investigation to be made by the director or any authorized representative of the director, of the wages being paid to women or minors in any occupation to ascertain whether any substantial number of women or minors in such occupation are receiving oppressive and unreasonable wages as defined in section five hundred and fifty-one. If, on the basis of information in the possession of the commissioner or the director, with or without a special investigation, the commissioner is of the opinion that any substantial number of women or minors in any occupation or occupations are receiving oppressive and unreasonable wages as defined in section five hundred and fifty-one, he shall

* So in original. [Section heading omitted.]

appoint a wage board to report upon the establishment of minimum fair wage rates for such women or minors in such occupation or occupations.

§ 555.* 1. A wage board shall be composed of not more than three representatives of the employers in any occupation or occupations, an equal number of representatives of the employees in such occupation or occupations and of not more than three disinterested persons representing the public, one of whom shall be designated as chairman. The commissioner after conferring with the director shall appoint the members of such wage board, the representatives of the employers and employees to be selected so far as practicable from nominations submitted by employers and employees in such occupation or occupations. Two-thirds of the members of such wage board shall constitute a quorum and the recommendations or report of such wage board shall require a vote of not less than a majority of all its members. Members of a wage board shall serve without pay, but may be reimburesd for all necessary traveling expenses. The commissioner after conferring with the director shall make and establish from time to time rules and regulations governing the selection of a wage board and its mode of procedure not inconsistent with this article.

2. A wage board shall have power to administer oaths and to require by subpoena the attendance and testimony of witnesses, the production of all books, records, and other evidence relative to any matters under investigation. Such subpoenas shall be signed and issued by a member of the wage board and shall be served and have the same effect as if issued out of the supreme court. A wage board shall have power to cause depositions of witnesses residing within or without the state to be taken in the manner prescribed for like depositions in civil actions in the supreme court.

* So in original. [Section heading omitted.]

3. The commissioner or the director shall present to a wage board promptly upon its organization all the evidence and information in the possession of the commissioner or director relating to the wages of women and minor workers in the occupation or occupations for which the wage board was appointed and all other information which the commissioner or the director deems relevant to the establishment of a minimum fair wage for such women and minors, and shall cause to be brought before the committee any witnesses whom the commissioner or the director deems material. A wage board may summon other witnesses or call upon the commissioner or the director to furnish additional information to aid it in its deliberation.

4. Within sixty days of its organization a wage board shall submit a report including its recommendations as to minimum fair wage standards for the women or minors in the occupation or occupations the wage standards of which the wage board was appointed to investigate. If its report is not submitted within such time the commissioner may constitute a new wage board.

5. A wage board may differentiate and classify employments in any occupation according to the nature of the service rendered and recommend appropriate minimum fair rates for different employments. A wage board may also recommend minimum fair wage rates varying with localities if in the judgment of the wage board conditions make such local differentiation proper and do not effect an unreasonable discrimination against any locality.

6. A wage board may recommend a suitable scale of rates for learners and apprentices in any occupation or occupations, which scale of learners' and apprentices' rates may be less than the regular minimum fair wage rates recommended for experienced women or minor workers in such occupation or occupations.

§ 556.* A report from a wage board shall be submitted to the commissioner who shall within ten days confer with the director and accept or reject such report. If the report is rejected the commissioner shall resubmit the matter to the same wage board or to a new wage board with a statement of the reasons for the resubmission. If the report is accepted it shall be published together with such proposed administrative regulations as the commissioner after conferring with the director may deem appropriate to implement the report of the wage board and to safeguard the minimum fair wage standards to be established, and notice shall be given of a public hearing to be held by the commissioner or the director not sooner than fifteen nor more than thirty days after such publication at which all persons in favor of or opposed to the recommendations contained in such report or in such proposed regulations may be heard.

§ 557.* Within ten days after such hearing the commissioner shall confer with the director and approve or disapprove the report of the wage board. If the report is disapproved the commissioner may resubmit the matter to the same wage board or to a new wage board. If the report is approved the commissioner shall make a directory order which shall define minimum fair wage rates in the occupation or occupations as recommended in the report of the wage board and which shall include such proposed administrative regulations as the commissioner may deem appropriate to implement the report of the wage board and to safeguard the minimum fair wage standards established. Such administrative regulations may include among other things, regulations defining and governing learners and apprentices, their rates, number, proportion or length of service, piece rates or their relation to time rates, overtime or part-time rates, bonuses or special pay for special or extra work, deductions for board, lodging, apparel or

* So in original. [Section heading omitted.]

other items or services supplied by the employer, and other special conditions or circumstances; and in view of the diversities and complexities of different occupations and the dangers of evasion and nullification, the commissioner may provide in such regulations without departing from the basic minimum rates recommended by the wage board such modifications or reductions of or addition to such rates in or for such special cases or classes of cases as those herein enumerated as the commissioner may find appropriate to safeguard the basic minimum rates established.

§ 558.* For any occupation for which minimum fair wage rates have been established the commissioner or the director may cause to be issued to a woman or minor, including a learner or apprentice, whose earning capacity is impaired by age or physical or mental deficiency or injury, a special license authorizing employment at such wages less than such minimum fair wage rates and for such period of time as shall be fixed by the commissioner or the director and stated in the license.

§ 559.* If the commissioner or the director or any authorized representative of the director has reason to believe that any employer is not observing the provisions of any order made by him under section five hundred and fifty-seven of this article, the commissioner or the director may, on fifteen days' notice, summon such employer to appear before the commissioner or the director to show cause why the name of such employer should not be published as having failed to observe the provisions of such order. After such hearing and the finding by the commissioner or the director of non-observance, the commissioner may cause to be published in a newspaper or newspapers circulating within the State of New York or in such other manner as the commissioner may deem appro-

* So in original. [Section heading omitted.]

priate, the name of any such employer or employers as having failed in the respects stated to observe the provisions of the directory order of the commissioner. Neither the commissioner nor any authorized representative of the commissioner, nor any newspaper publisher, proprietor, editor, nor employee thereof shall be liable to an action for damages for publishing the name of any employer as provided for in this article, unless guilty of some wilful misrepresentation.

§ 560.* If at any time after a directory minimum fair wage order has been in effect for nine months the commissioner is of the opinion after conferring with the director that the persistent non-observance of such order by one or more emplo[illegible] a threat to the maintenance of fair minimum wage standards in any occupation or occupations the commissioner or the director may give notice of the intention of the commissioner to make such order mandatory and of a public hearing to be held not sooner than fifteen nor more than thirty days after such publication at which all persons in favor of or opposed to a mandatory order may be heard by the commissioner or the director. After such hearing the commissioner, if he adheres to his opinion, may make the previous directory order or any part thereof mandatory and so publish it.

§ 561.* At any time after a minimum fair wage order has been in effect for one year or more, whether during such period it has been directory or mandatory, the commissioner may on his own motion after conferring with the director and shall on petition of fifty or more residents of the state reconsider the minimum fair wage rates set therein and reconvene the same wage board or appoint a new wage board to recommend whether or not the rate or rates contained in such order should be modified. The report of such wage board shall be dealt with in the man-

* So in original. [Section heading omitted.]

ner prescribed in sections five hundred and fifty-six and five hundred and fifty-seven of this article provided that if the order under reconsideration has theretofore been made mandatory in whole or in part by the commissioner under section five hundred and sixty then the commissioner in making any new order or confirming any old order shall have power to declare to what extent such order shall be directory and to what extent mandatory.

§ 562.* The commissioner may at any time and from time to time after conference with the director propose such modifications of or additions to any administrative regulations included in any directory or mandatory order of the commissioner without reference to a wage board, as the commissioner may deem appropriate to effectuate the purposes of this article, provided such proposed modifications or additions could legally have been included in the original order, and notice shall be given of a public hearing to be held by the commissioner or director not less than fifteen days after such publication at which all persons in favor of or opposed to such proposed modification or additions may be heard. After such hearing the commissioner may make an order putting into effect such proposed modification of or additions to the administrative regulations as he deems appropriate, and if the order of which the administrative regulations form a part has theretofore been made mandatory in whole or in part by the commissioner under section five hundred and sixty, then the commissioner in making any new order shall have the power to declare to what extent such order shall be directory and to what extent mandatory.

§ 563.* All questions of fact arising under this act except as otherwise herein provided shall be decided by the commissioner or the director and there shall be no appeal from the decision of the commissioner or the di-

* So in original. [Section heading omitted.]

rector on any such question of fact, but there shall be a right of review by the industrial board and the courts as provided in article three of the labor law from any ruling or holding on a question of law included or embodied in any decision or order of the commissioner or the director.

§ 564.* Every employer of women and minor workers shall keep a true and accurate record of the hours worked by each and the wages paid by him to each and shall furnish to the commissioner or the director or the authorized representative of the director upon demand a sworn statement of the same. Such records shall be open to inspection by the commissioner or the director or any authorized representative of the director at any reasonable time. Every employer subject to a minimum fair wage order whether directory or mandatory shall keep a copy of such order posted in a conspicuous place in every room in which women or minors are employed. Employers shall be furnished copies of orders on request without charge.

§ 565.* 1. Any employer and his agent, or the officer or agent of any corporation, who discharges or in any other manner discriminates against any employee because such employee has served or is about to serve on a wage board or has testified or is about to testify before any wage board or in any other investigation or proceeding under or related to this article or because such employer believes that said employee may serve on any wage board or may testify before any wage board or in any investigation or proceeding under this article shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than fifty nor more than two hundred dollars.

2. Any employer or the officer or agent of any corporation who pays or agrees to pay to any woman or minor

* So in original. [Section heading omitted.]

employee less than the rates applicable to such woman or minor under a mandatory minimum fair wage order shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than fifty nor more than two hundred dollars or by imprisonment of not less than ten nor more than ninety days or by both such fine and imprisonment, and each week in any day of which such employee is paid less than the rate applicable to him under a mandatory minimum fair wage order and each employee so paid less shall constitute a separate offense.

3. Any employer or the officer or agent of any corporation who fails to keep the records required under this article or to furnish such records to the commissioner or the director or any authorized representative of the director upon request shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than twenty-five nor more than one hundred dollars, and each day of such failure to keep the records requested under this article or to furnish same to the commissioner or the director or any authorized representative of the director shall constitute a separate offense.

§ 566.* If any woman or minor worker is paid by his employer less than the minimum fair wage to which he is entitled under or by virtue of a mandatory minimum fair wage order he may recover in a civil action the full amount of such minimum wage less any amount actually paid to him by the employer together with costs and such reasonable attorney's fees as may be allowed by the court, and any agreement between him and his employer to work for less than such mandatory minimum fair wage shall be no defense to such action. At the request of any woman or minor worker paid less than the minimum wage to which he was entitled under a mandatory order the commissioner may take an assignment of such wage claim

* So in original. [Section heading omitted.]

in trust for the assigning employee and may bring any legal action necessary to collect such claim, and the employer shall be required to pay the costs and such reasonable attorney's fees as may be allowed by the court.

§ 567.* If any provisions of this article or the application thereof to any person or circumstance, is held invalid the remainder of the article and the application of such provision to other persons or circumstances shall not be affected thereby.

§ 2. This act shall take effect immediately.

* So in original. [Section heading omitted.]

APPENDIX B

U. S. Statutes at Large, 65th Congress, 1917-1919, Vol. 40, Pt. I, Public Laws, Ch. 174, pp. 960-964.

SECTION 1. Where used in this act, the term "board" means the minimum-wage board created by section 2; the term "commissioners" means the Commissioners of the District of Columbia; the term "woman" includes only a woman of 18 years of age or over; the term "minor" means a person of either sex under the age of 18 years; the term "occupation" includes a business, industry, trade, or branch thereof, but shall not include domestic service.

SEC. 2. There is hereby created a board to be known as the "minimum-wage board," to be composed of three members to be appointed by the Commissioners of the District of Columbia. As far as practicable, the members shall be so chosen that one will be representative of employees, one representative of employers, and one representing the public.

The commissioners shall make their first appointments hereunder within 30 days after this act takes effect, and shall designate one of the three members first appointed to hold office until January 1, 1919; and one to hold office until January 1, 1920; and one to hold office until January 1, 1921. On or before the 1st day of January of each year, beginning with the year 1919, the commissioners shall appoint a member to succeed the member whose term expires on such 1st day of January, and such new appointee shall hold office for the term of three years from such 1st day of January. Each member shall hold office until his successor is appointed and has qualified; and any vacancy that may occur in the membership of the board shall be filled by appointment by the commissioners for the unexpired portion of the term.

A majority of the members shall constitute a quorum to transact business, and the act or decision of such a majority shall be deemed the act or decision of the board; and no vacancy shall impair the right of the remaining members to exercise all the powers of the board.

SEC. 3. The first members appointed shall, within 20 days after their appointment, meet and organize the board by electing one of their number as chairman and by choosing a secretary, who shall not be a member of the board; and on or before the 10th day of January of each year thereafter the board shall elect a chairman and choose a secretary for the ensuing year. The chairman and the secretary shall each hold office until his successor is elected or chosen; but the board may at any time remove the secretary. The secretary shall perform such duties as may be prescribed and receive such salary, not in excess of $2,500 per annum, as may be fixed by the board. None of the members shall receive any salary as such. The board shall have power to employ agents and such other assistants as may be necessary for the proper performance of its duties; *Provided,* That until further authorization by Congress, the sum which it may expend, including the salary of the secretary, shall not exceed the sum of $5,000.

SEC. 4. At any public hearing held by the board any person interested in the matter being investigated may appear and testify. Any member of the board shall have power to administer oaths, and the board may require by subpoena the attendance and testimony of witnesses, the production of all books, registers, and other evidence relative to any matters under investigation, at any such public hearing or at any session of any conference held as hereinafter provided. In case of disobedience to a subpoena the board may invoke the aid of the Supreme Court of the District of Columbia in requiring the attendance and testimony of witnesses and the production of

documentary evidence. In case of contumacy or refusal to obey a subpoena the court may issue an order requiring appearance before the board, the production of documentary evidence, and the giving of evidence touching the matter in question, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

SEC. 5. The board is hereby authorized and empowered to make rules and regulations for the carrying into effect of this act, including rules and regulations for the selection of members of the conference hereinafter provided for and the mode of procedure thereof.

SEC. 6. The board shall, on or before the 1st day of January of the year 1919, and of each year thereafter, make a report to the commissioners of its work and the proceedings under this act.

SEC. 7. There is hereby authorized to be appropriated, out of the revenues of the District of Columbia, for the fiscal year ending June 30, 1919, the sum of $5,000, or so much thereof as may be necessary, to carry into effect the provisions of this act.

SEC. 8. The board shall have full power and authority: (1) To investigate and ascertain the wages of women and minors in the different occupations in which they are employed in the District of Columbia; (2) to examine, through any member or authorized representative, any book, payroll, or other record of any employer of women or minors that in any way appertains to or has a bearing upon the question of wages of any such women or minors; and (3) to require from such employer full and true statements of the wages paid to all women and minors in his employment.

Every employer shall keep a register of the names of the women and minors employed by him in any occupa-

tion in the District of Columbia, of the hours worked by each, and of all payments made to each, whether paid by the time or by the piece, and shall, on request, permit any member or authorized representative of the board to examine such register.

To assist the board in carrying out this act the commissioners shall at all times give it any information or statistics in their possession under the act of Congress approved February 24, 1914, entitled "An act to regulate hours of employment and safeguard the health of females employed in the District of Columbia."

SEC. 9. The board is hereby authorized and empowered to ascertain and declare, in the manner hereinafter provided, the following things: (a) Standards of minimum wages for women in any occupation within the District of Columbia, and what wages are inadequate to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals; and (b) standards of minimum wages for minors in any occupation within the District of Columbia and what wages are unreasonably low for any such minor workers.

SEC. 10. If, after investigation, the board is of opinion that any substantial number of women workers in any occupation are receiving wages inadequate to supply them with the necessary cost of living and maintain them in health and protect their morals, it may call and convene a conference for the purpose and with the powers of considering and inquiring into and reporting on the subject investigated by the board and submitted by it to such conference. The conference shall be composed of not more than three representatives of the employers in such occupation, of an equal number of representatives of the employees in such occupation, of not more than three disinterested persons representing the public, and one or more members of the board. The board shall name and appoint all the members of the conference and desig-

nate the chairman thereof. Two-thirds of the members of the conference shall constitute a quorum, and the decision or recommendation or report of the conference on any subject submitted shall require a vote of not less than a majority of all its members.

The board shall present to the conference all the information and evidence in its possession or control relating to the subject of inquiry by the conference, and shall cause to be brought before the conference any witnesses whose testimony the board deems material.

SEC. 11. After completing its consideration of any inquiry into the subject submitted to it by the board, the conference shall make and transmit to the board a report containing its findings and recommendations on such subject, including recommendations as to standards of minimum wages for women workers in the occupation under inquiry and as to what wages are inadequate to supply the necessary cost of living to women workers in such occupation and to maintain them in health and to protect their morals.

In its recommendations on a question of wages the conference (1) shall, where it appears that any substantial number of women workers in the occupation under inquiry are being paid by piece rates as distinguished from time rate, recommend minimum piece rates as well as minimum time rate and recommend such minimum piece rates as will, in its judgment, be adequate to supply the necessary cost of living to women workers in such occupation of average ordinary ability and to maintain them in health and protect their morals; and (2) shall, when it appears proper or necessary, recommend suitable minimum wages for learners and apprentices in such occupation and the maximum length of time any woman worker may be kept at such wages as a learner or apprentice, which wages shall be less than the regular minimum wages recommended for the regular women workers in such occupation.

SEC. 12. Upon receipt of any report from any conference, the board shall consider and review the recommendations, and may approve or disapprove any or all of such recommendations, and may resubmit to the same conference, or a new conference, any subject covered by any recommendation so disapproved.

If the board approves any recommendations contained in any report from any conference, it shall publish a notice, once a week, for four successive weeks in a newspaper of general circulation printed in the District of Columbia, that it will, on a date and at a place named in the notice, hold a public hearing at which all persons in favor of or opposed to such recommendations will be heard.

After such hearing the board may, in its discretion, make and render such an order as may be proper or necessary to adopt such recommendations and carry them into effect, requiring all employers in the occupation affected thereby to observe and comply with such order. Such order shall become effective 60 days after it is made. After such order becomes effective, and while it is effective, it shall be unlawful for any employer to violate or disregard any of its terms or provisions, or to employ any woman worker in any occupation covered by such order at lower wages than are authorized or permitted therein.

The board shall, as far as is practicable, mail a copy of such order to every employer affected thereby; and every employer affected by any such order shall keep a copy thereof posted in a conspicuous place in each room in his establishment in which women workers are employed.

SEC. 13. For any occupation in which only a minimum time-rate wage has been established, the board may issue to a woman whose earning capacity has been impaired by age or otherwise, a special license authorizing her employment at such wage less than such minimum time-rate wage as shall be fixed by the board and stated in the license.

SEC. 14. The board may at any time inquire into wages of minors employed in any occupation in the District of Columbia, and determine suitable wages for them. When the board has made such determination it may make such an order as may be proper or necessary to carry such determination into effect. Such order shall become effective 60 days after it is made; and after such order becomes effective and while it is effective it shall be unlawful for any employer in such occupation to employ a minor at less wages than are specified or required in or by such order.

SEC. 15. Any conference may make a separate inquiry into and report on any branch of any occupation, and the board may make a separate order affecting any branch of any occupation.

SEC. 16. The board shall from time to time investigate and ascertain whether or not employers in the District of Columbia are observing and complying with its orders, and shall report to the corporation counsel of the District of Columbia all violations of this act.

SEC. 17. All questions of fact arising under the foregoing provisions of this act shall, except as otherwise herein provided, be determined by the board, and there shall be no appeal from the decision of the board on any such question of fact; but there shall be a right of appeal from the board to the supreme court of the District of Columbia from any ruling or holding on a question of law included or embodied in any decision or order of the board; and, on the same question of law, from such court to the court of appeals of the District of Columbia. In all such appeals the corporation counsel shall appear for and represent the board.

SEC. 18. Whoever violates this act, whether an employer or his agent, or the director, officer, or agent of any cor-

poration, shall be deemed guilty of a misdemeanor; and, upon conviction thereof, shall be punished by a fine of not less than $25 nor more than $100, or by imprisonment not less than 10 days nor more than three months, or by both such fine and imprisonment.

SEC. 19. Any employer and his agent, or the director, officer, or agent of any corporation, who discharges or in any other manner discriminates against any employee because such employee has served or is about to serve on any conference, or has testified or is about to testify, or because such employer believes that said employee may serve on any conference or may testify in any investigation or proceedings under or relative to this act, shall be deemed guilty of a misdemeanor; and, upon conviction thereof, shall be punished by a fine of not less than $25 nor more than $100.

SEC. 20. Any act which, if done or omitted to be done by any agent or officer or director acting for such employer, would constitute a violation of this act, shall also be held to be a violation by the employer and subject such employer to the liability provided for by this act.

SEC. 21. Prosecutions for violations of this act shall be on information filed in a police court of the District of Columbia by the corporation counsel.

SEC. 22. If any woman worker is paid by her employer less than the minimum wage to which she is entitled under or by virtue of an order of the board, she may recover in a civil action the full amount of such minimum wage, less any amount actually paid to her by the employer, together with such reasonable attorney's fees as may be allowed by the court; and any agreement for her to work for less than such minimum wage shall be no defense to such action.

SEC. 23. This act shall be known as the "District of Columbia minimum wage law." The purposes of the act are to protect the women and minors of the District from conditions detrimental to their health and morals, resulting from wages which are inadequate to maintain decent standards of living; and the act in each of its provisions and in its entirety shall be interpreted to effectuate these purposes.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1935
No. 838

FREDERICK L. MOREHEAD, as the Warden of the City Prison in the Borough of Brooklyn,
Appellant,

against

PEOPLE ex rel. JOSEPH TIPALDO,
Appellee.

FACTUAL BRIEF FOR APPELLANT

Economic Background of Article 19, Labor Law, Chap. 584, Laws of 1933.

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"* * * a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

Roberts, J. in *Nebbia* v. *People*, 291 U. S. 502, 525.

CONTENTS

PAGE

Introductory statement ix

I. Wage earning women constitute a large and growing element in the working population of the State. They occupy this position because of their need for supporting themselves and their dependents 1

1. During the past 30 years there has been a steady increase in the number of employed women and in the percentage they form of all gainfully occupied persons in the State 1

2. Although women wage earners are still considerably younger, on the whole, than men, the old idea that women are transients in industry and work only for a few years before marriage is not supported by fact. There has been a growing tendency for women to continue working after marriage and to remain employed for long periods.. 2

3. Women are in industry and in other fields of employment because they must support themselves and their dependents 8

II. Data regarding women's earnings reveal such discrepancies and variations in wages paid for identical work as to indicate that no relationship exists between the value of the services rendered and the wages paid..... 19

1. Women are paid widely varying rates for the same work. In many industries there are employers

PAGE

who pay wages not commensurate with the value of the services rendered since they are far less than those paid by the majority of the employers for the same work..... 19

2. The fact that in many instances women are paid lower wages than men for the same work is a further indication that women receive wages which are not commensurate with the value of the services rendered 23

III. Women as a group have always been paid low wages as measured by the cost of living and the purchasing power of the dollar..... 27

1. Women have always been a low wage group in the labor market.. 27

2. Considerable numbers of women receive wages which do not meet the cost of living at subsistence levels, and still larger numbers of women do not receive wages adequate to meet the minimum cost of living necessary for health..... 32

3. The employment of women at wages less than the cost of living is a social problem. This is indicated by the fact that a considerable number of employed women turn to relief agencies for help and are now on the relief rolls..... 37

IV. Wage earning women cannot remedy the situation by their own unaided efforts.. 40

1. Their bargaining power is weak, since they are largely unorganized 40

PAGE

2. Their bargaining power is weak, since they are concentrated in the highly seasonal industries and are subject to great irregularity in employment 44

V. Employers have been unable to remedy the situation through voluntary efforts 48

VI. The application of the minimum wage law to the laundry industry has established a wage under which the industry can operate 58

1. Conditions prevailing in the industry prior to the wage order..... 58

2. Findings of the preliminary investigation in the laundry industry 61

3. Basis for recommendations of the Laundry Minimum Wage Board.. 66

4. The effect of the wage order on the wages of women and minors employed in laundries in New York State 69

VII. The experience and principles in the fixing of group wages on the basis of value of services..... 76

1. The development of principles of group wage determination according to value of services..... 76

2. Evidence illustrative of the principles of group wage determination according to value of services.... 80

VIII. Legislation in other states and countries on hours and wages..... 146

Appendix

Tables 153

Bibliography 186

CHARTS

PAGE

I. Females 10 Years of Age and Over Gainfully Occupied in New York State, 1900–1930 .....face 2

II. Married Women 15 Years of Age and Over Gainfully Occupied in New York State, 1890–1930 .....face 6

III. Plant by Plant Comparison of Hourly Earnings of Women in the Same Occupations in Factories, New York City, 1935 .....face 22

IV. Average Hourly Earnings of Men and Women Employed in the Same Occupations in Six Industries in New York State .....face 24

V. Average Weekly Earnings of Men and Women in Representative New York State Factories, 1923–1935.....face 30

APPENDIX TABLES

PAGE

I. Gainfully Occupied Persons in Relation to the Total Population, by Sex, New York State, 1900–1930.. 153

II. Gainfully Occupied Women in Relation to Total Persons Gainfully Occupied, New York State, 1900–1930 154

III. Proportion of Females 10 Years Old and Over Gainfully Occupied, by Age, New York State, 1900 and 1930 154

IV. Duration of Employment in the Same Industry, Compiled from Special Studies, 1913–1934 155

V. Proportion of Married Women 15 Years Old and Over Gainfully Occupied, New York State, 1890–1930 156

VI. Proportion of Married Women in Various Industries, Compiled from Special Studies, 1913–1934..... 157

VII. Plant by Plant Comparison of Hourly Earnings of Women in Six Industries, New York City, 1935.. 158

VIII. Hourly Earnings of Women in Six Industries in New York City, 1935. 167

IX. Average Hourly Earnings of Men and Women in Selected Industries in New York State, 1929–1932.... 168

X. Week's Earnings of Women in Six Industries, 1935 169

XI. Week's Earnings of Women Employed in Various Industries in New York State, Compiled from Special Studies, 1913–1934..... 172

PAGE

XII. Average Weekly Earnings of Men and Women in Representative New York State Factories, 1923–1935.. 174

XIII. Average Minimum Weekly Cost of Maintaining a Fair American Standard of Living for Single Workers in New York City, 1926, Reported by the National Industrial Conference Board, Inc..... 175

XIV. Average Minimum Weekly Cost of Maintaining a Fair American Standard of Living for a Single Woman in New York City, 1926 and 1935 176

XV. Weekly Budget at a "Minimum Self-Supporting Level" for a Single Woman, Reported by the Welfare Council of New York City for July, 1935 176

XVI. Weekly Earnings of Employed Women Accepted for Relief by the Emergency Relief Bureau, New York City, May to September, 1935. 177

XVII. Members of the Laundry Minimum Wage Board, New York State, 1933 178

XVIII. Compliance of Laundries with Wage Orders, by Locality, 1933–1935.... 180

XIX. Laundry Employees Classified According to the Relation of Their Earnings to the Minimum Rates Set by Wage Orders, 1933–1935... 181

XX. Compliance of Laundries with Wage Orders, by Size of Laundry, November, 1935 182

XXI. Number of Men and Women Employed in Laundries Covered by Wage Orders, 1933–1935..... 183

INTRODUCTORY STATEMENT

Social, economic and physical factors give rise to legislative action. It is now accepted that such facts may be gleaned by the courts from all public and available sources. Judicial precedent and decisions are not the sole source of information, nor the only guide which the courts may adopt in reaching a conclusion in legislative matters. Widespread beliefs, economic facts from reliable researches, literature of established value, matters of general knowledge, results of special studies into peculiarly pertinent questions, all these are proper material where a question may be debatable or debated and facts lie at the basis of the statutory action.*

This factual presentation of material, prepared from well known and reliable sources of information, compilation of which has been expedited in preparation so as to be available to this court, contains evidence of conditions which must be deemed to have been in legislative contemplation. Notwithstanding the strong presumptions of constitutionality, of legislative inquiry, and of the existence of facts warranting the legislation contested, the legitimacy of the end of the statute and the reasonableness of the method adopted to accomplish the end are better appreciated with the presentation of the facts themselves.

The following pages are devoted to a collation of the general and specific facts portraying the position of women in industry and the sources from which they are gathered. They are respectfully submitted to this court as pertinent in the discussion of the legal issues presented by the appeal herein.

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* *Muller* v. *Oregon*, 208 U. S. 412, Brewer, J.; *Peo.* v. *Perretta*, 228 App. Div. (N. Y.) 420, 422; *Peo.* v. *Schweinler Press*, 214 N. Y. 395; *Coty, Inc.* v. *Hearn*, Special Term, Rosenman, J., N. Y. Law Journal, Nov. 26, 1935.

The deepest appreciation is herein expressed by the Attorney General to the following members of the staff of the New York State Department of Labor for their incalculable aid and diligent efforts in preparing the material herein:

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I. WAGE EARNING WOMEN CONSTITUTE A LARGE AND GROWING ELEMENT IN THE WORKING POPULATION OF THE STATE. THEY OCCUPY THIS POSITION BECAUSE OF THEIR NEED FOR SUPPORTING THEMSELVES AND THEIR DEPENDENTS.

1. During the past 30 years there has been a steady increase in the number of employed women and in the percentage they form of all gainfully occupied persons in the State.

The United States Census shows that the number of gainfully employed women in New York State has more than doubled since 1900. (See Chart I.) In spite of the decline in child labor during this period, the number of employed females 10 years of age and over has increased as follows:

1900	672,045
1930	1,415,105

Of every 100 females 10 years of age and over, 23 were gainfully employed in 1900 and 27 in 1930.[1]

The increase in the number of gainfully occupied women has been greater, proportionately, than that of men. Consequently of every 100 persons in the working population of the State in 1930, approximately 26 were women and girls, as compared with 22 in 1900.[2]

[1] See Appendix, Table I.
[2] See Appendix, Table II.

2. Although women wage earners are still considerably younger, on the whole, than men, the old idea that women are transients in industry and work only for a few years before marriage is not supported by fact. There has been a growing tendency for women to continue working after marriage and to remain employed for long periods.

The average[3] age of gainfully employed women in New York State has increased from 25 in 1900 to 30 in 1930. Of every 100 employed women, 61 were at least 25 years of age in 1930, as compared with only 50 in 1900. This change in age distribution has been due in part to the decrease in numbers of very young workers, but it is also to be attributed to the growing numbers of women who have remained at work into middle age and beyond. In 1930, 29 per cent of all women in the State between the ages of 25 and 45 were working, and approximately 17 per cent of all those 45 years and over.[4] The percentage which gainfully occupied women formed of all women in each of the various age groups in 1900 and in 1930 was as follows:

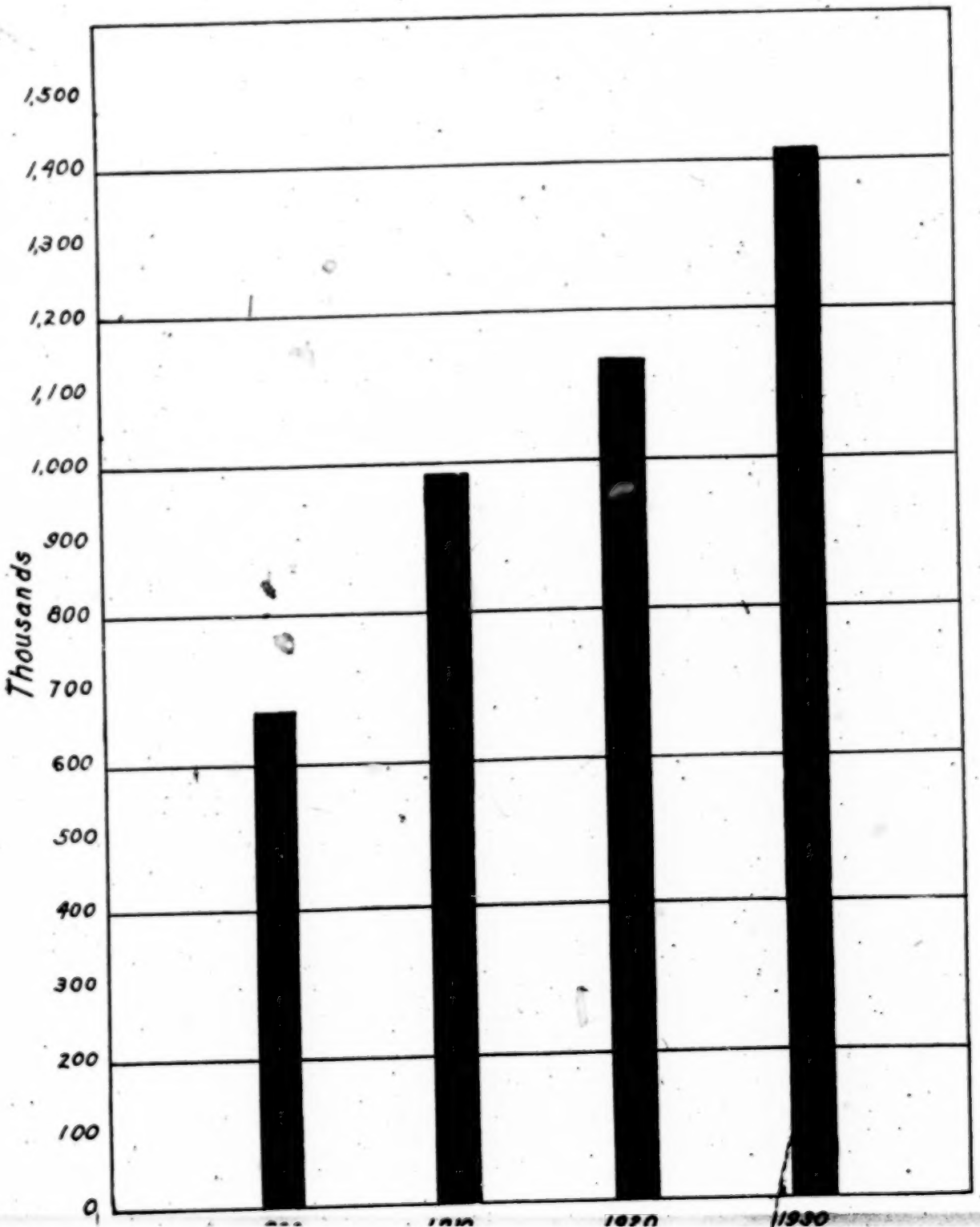
	1900	1930
10 to 24 years	32.4	33.4
25 to 44 years.....	21.6	29.1
45 years and over.....	12.2	16.8

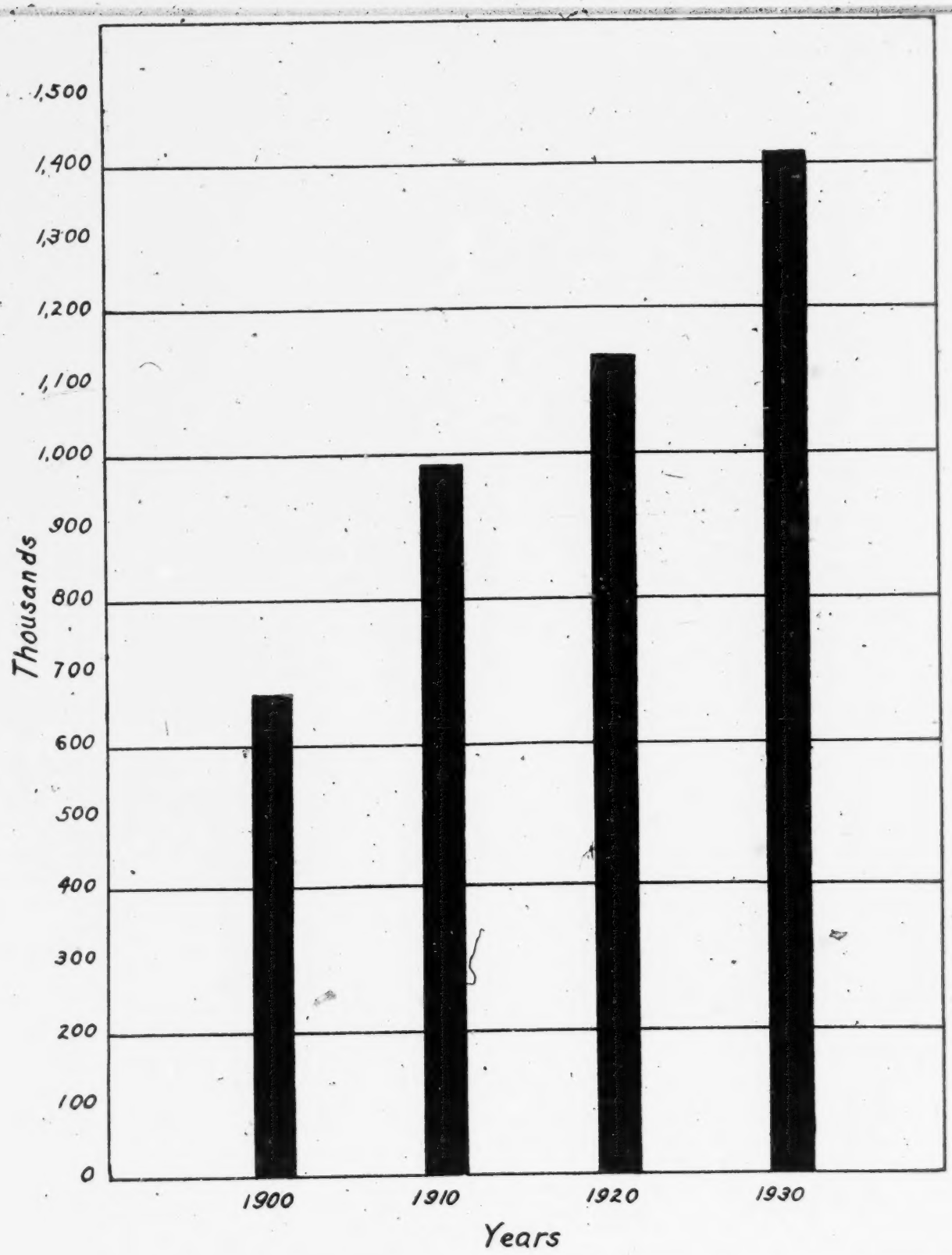
That women go to work with the intention of remaining there only a short time has been disproven by numerous studies of the duration of employment of women workers. Since such studies

[3] The type of average used here, and throughout the report except where otherwise noted, is the median. By definition the median is the mid-point in a series of items arranged in order of magnitude, half the items being above and half below this point.

[4] See Appendix, Table III.

CHART I - FEMALES 10 YEARS OF AGE AND OVER GAINFULLY OCCUPIED IN NEW YORK STATE 1900 - 1930





From Fifteenth Census of the United States, 1930 – (See Appendix, Table I)

have been limited to the length of time women have been employed in the same industry or by the same firm, the information obtained on this point is an understatement and by no means indicates the total number of years these women have been working, particularly in the case of women employed in unskilled jobs. A group of packers in a candy factory, for instance, may have been employed in numerous other industries throughout the course of their working lives, but no data are available to show how long they have been gainfully employed since beginning work. Investigations made by the Women's Bureau of the United States Department of Labor, the New York State Department of Labor and other agencies, of the duration of employment in various industries show, however, that considerable proportions of women have been employed in the same industry or by the same firm for long periods.

16 *Duration of Employment in the Same Industry*[1]

Industry and locality	Date	Per cent of women employed in the same industry	
		5 years and over	10 years and over
17			
Hotels and restaurants—New York State	1934	[2] 25.6	[2] 7.0
Beauty shops—4 cities	1933	54.3	21.4
Glove industry — Fulton County, N. Y.	1933	[2] 23.8	[2] 9.2
Cigar industry—11 states	1929–30	51.1	28.6
Cigarette industry—5 cities	1929–30	52.3	25.7
18 Slaughtering and meat packing industry—13 cities	1928	52.5	18.6
Various industries—industrial women attending adult education classes	1928–30	[3] 76.6	[3] 37.7
	1925	[4] 99.0	[3] 47.4
Various industries — Manchester, N. H.	1919–20	40.7	19.3
Millinery industry — New York City	1914	57.8	22.9
19 Shirt industry—New York State	1913	31.5	14.4
Paper box industry—New York State	1913	34.9	14.7
Candy industry—New York State	1913	22.2	8.6

[1] Based on Table IV, Appendix.

[2] These figures apply to length of employment with the same
20 firm.

[3] These figures apply to length of employment "in industry", not necessarily in the same industry.

[4] Includes women with 4 or more years' experience "in industry."

The growing tendency for women to remain at work after marriage has been a factor in the increasing age of women wage earners and the

duration of their employment. Census figures show that the number and proportion of married women workers have increased with each decade. (See Chart II.) In 1890, less than four of every 100 married women in the State were gainfully employed. By 1930 the proportion had increased to 12 out of every 100,[5] and married women comprised almost one-fourth (23 per cent) of all gainfully occupied women and 27 per cent of those in manufacturing and mechanical industries.[6]

Because of the widespread interest in the employment of married women and the numerous problems involved, many studies have been made of the marital status of wage earning women in various industries and occupations. These indicate that there is greater concentration of married women in some industries than in others. Figures on the proportion of married women as shown by various studies are as follows:

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[5] See Appendix, Table V.

[6] United States Department of Commerce, Bureau of the Census, *Fifteenth Census of the United States, 1930, Population, Vol. IV, Occupations, by States*, p. 1164.

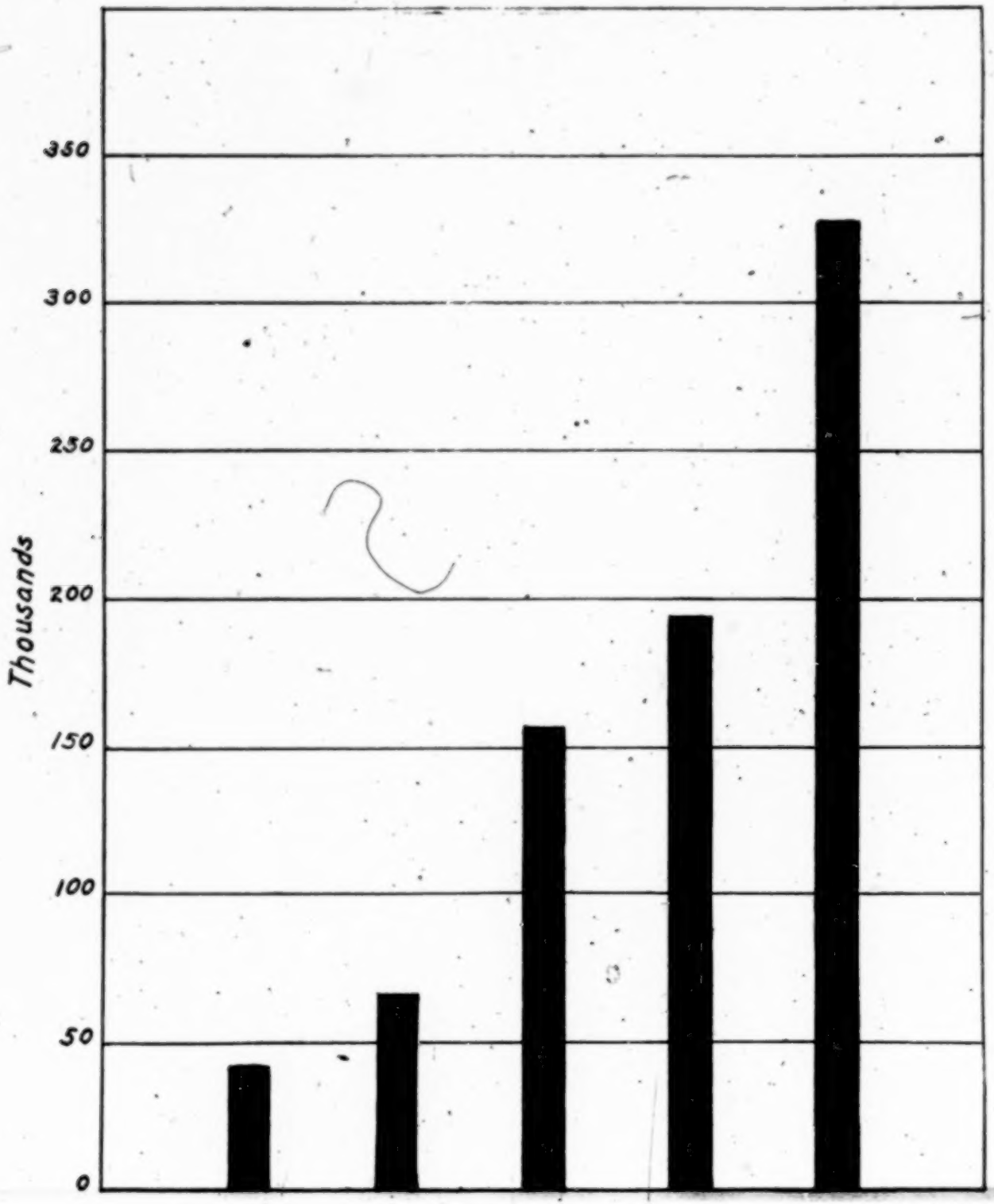
Proportion of Married Women in Various Industries, 1913–1934[1]

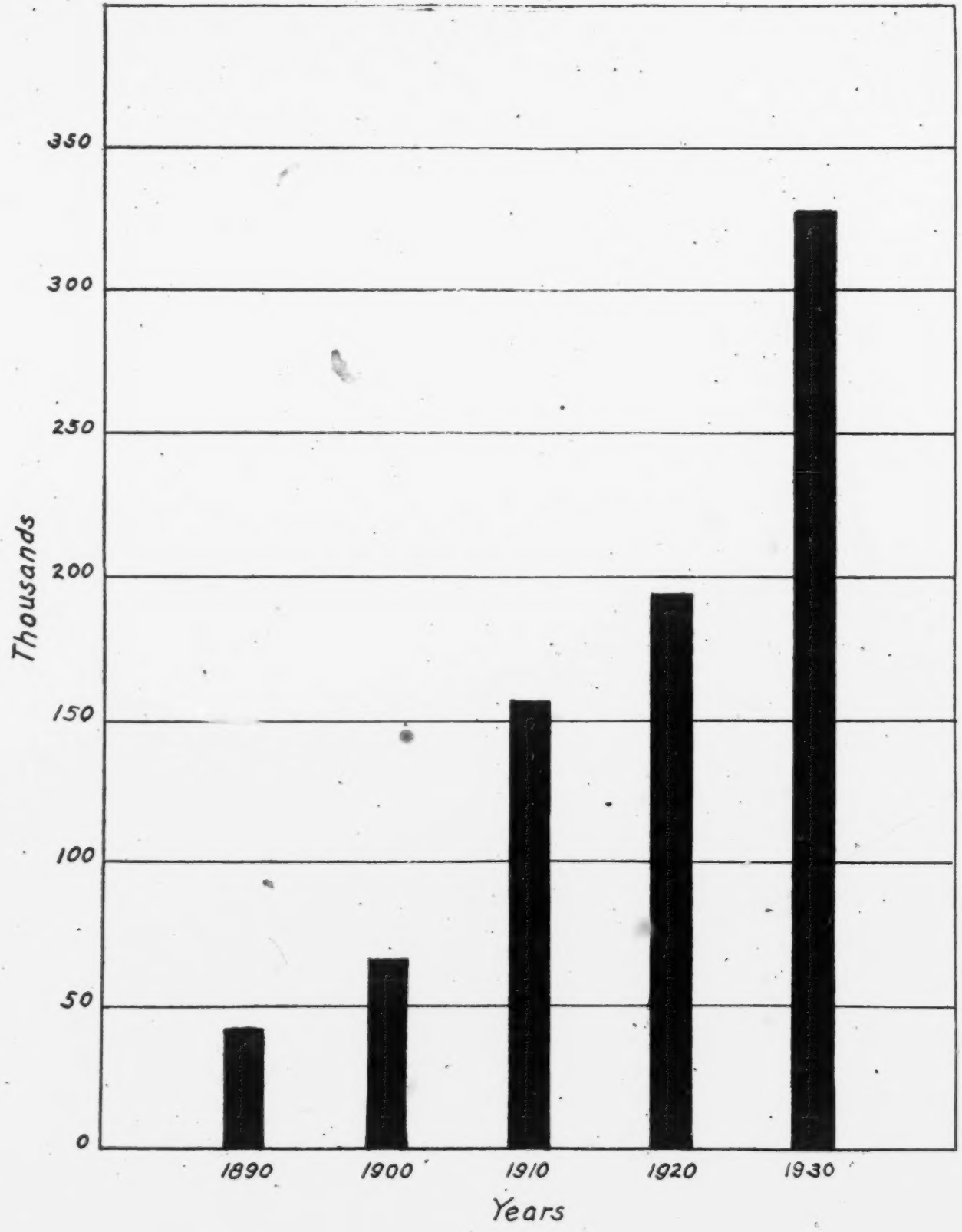
Industry and locality	Date	Per cent of married women
Hotels and restaurants—New York State	1934	29.9
Beauty shops—4 cities	1933	23.7
Glove industry—Fulton County, N. Y.	1933	40.0
South Bend, Ind.		
All industries	1930	43.7
Manufacturing industries	1930	48.9
Clerical	1930	22.4
Sales	1930	39.7
Cigar industry—11 states	1929–30	39.3
Cigarette industry—5 cities	1929–30	38.6
All industries—Newburgh, N. Y.	1929	28.5
Binghamton, N. Y.		
All industries	1926	48.2
Manufacturing industries	1926	51.1
Laundries	1926	54.9
Mercantile establishments	1926	32.8
Restaurants	1926	46.4
5 and 10 cent stores—New York City	1921	23.0
Millinery industry—New York City	1914	5.4
Button industry—New York City	1913	3.1
Shirt industry—New York State	1913	11.1
Paper box industry—New York State	1913	5.5

[1] Based on Table VI, Appendix.

It is the practice of the Bureau of the Census to classify as married women only those who are living with their husbands, and to include in separate categories those who are widowed, separated and divorced. The same classifications were followed in the special studies referred to, and for this reason the above figures are an understatement of the extent to which women with family

CHART II - MARRIED WOMEN 15 YEARS OF AGE AND OVER GAINFULLY OCCUPIED IN NEW YORK STATE 1890-1930





From Fifteenth Census of the United States, 1930 - (See Appendix, Table IV)

responsibilities are employed. In 25 studies made by the United States Women's Bureau, covering 169,255 employed women, it was found that nearly half the women were or had been married. In 10 of these studies single women formed less than one-half the group.[7]

[7] United States Department of Labor, Women's Bureau, *Women in Industry*, Bulletin No. 91, 1931, p. 17.

3. Women are in industry and in other fields of employment because they must support themselves and their dependents.

Studies of the economic status of wage earning women show that they are working to support themselves and in many cases also to support others who are wholly or partially dependent upon them.

For the majority of women who are "on their own," without family ties, the only source of income is what they can earn by their labor. No comprehensive statistics are available to indicate the numerical importance of this group of "unattached" women in New York State today. In 1920, however, the Bureau of the Census made a special study of the family relationship of employed women, tabulating the census schedules for such women in 11 cities in various parts of the country according to the living arrangements of the women.[8] As shown in the following table, it was found that women not living with their families or with relatives comprised 27 per cent of the 373,204 gainfully employed women 16 years of age and over:[9]

	Per cent
Living alone	5.9
Boarding or lodging	13.5
Living in employer's family	8.0
Living in family of two or more members	72.6

Rochester, New York, was one of the 11 cities included in the study. The family relationship of

[8] United States Department of Commerce, Bureau of the Census, *Women in Gainful Occupations, 1870 to 1920*, Census Monograph IX, 1929, pp. 122–156.

[9] *Ibid.*, p. 154.

the 36,956 employed women in that city in 1920 was reported as follows:[10]

	Per cent
Living at home as head of family (including women living alone)	10.5
Boarding or lodging or living with employer	22.5
Living with father	30.7
Living with mother	11.9
Living with husband or other relative	24.4

These statistics do not give a complete picture, since women living at home as heads of families were not separated in the analysis from those living "at home" alone. Nevertheless, the figures do indicate that a third of the employed women in Rochester were either living at home as the heads of families or living apart from the family group.

It is sometimes assumed that women wage earners who live with their families are not dependent for their own support upon what they can earn. Studies of the responsibilities of working women living at home show, on the contrary, that a considerable number are the only breadwinners in their families, and that even younger women who are living with parents must contribute a large part of their earnings to the support of the family group.

Women have always shared in the support of their families. In the days of a self-sufficing family economy, they contributed their labor for the home production of clothing, food supplies, and other family needs. With the growth of the

[10] *Ibid.*, p. 141.

industrial system and the substitution of factory made goods for those produced wholly at home, it became increasingly necessary for women to work outside the home in order to contribute in cash their share of the family income.

"While industrial changes have been making it possible for women to become wage earners, the altered economic conditions of the modern family have been making it necessary. Compare the budget of the rural family of two generations ago with that of its city grandchildren today. The earlier family grew its food and prepared it at home, knit its stockings and made most of its clothing, chopped down trees for its fuel. There was no entertainment to be bought, no carfare to be paid. Women often contributed more than men to the real income of the family. . . . A family could well afford to support several 'dependent' women who made its clothing, cooked its food, washed its clothes, and even raised the vegetables and milked the cows.

"But the 'typical working class family' today, we are told, must spend half its income for food, a third or a fourth of it for rent. Then comes clothing—most of it, like the food, bought at the store, much of it ready to wear—gas and electricity, carfare to work, the movies Saturday night, and all the incidentals requisite to living and working in a city. The significant fact is that all of it must be secured in exchange for the pay envelope; all of it reduced to terms of dollars and cents. When the credit side of the family budget included a large percentage of raw materials made up

at home, [the] father produced only one part of the family income. Now that the 'home mades' have almost disappeared, or are costlier to produce than factory mades, can he alone and unaided produce the dollars and cents out of which they must be supplied?'"[11] 51

Regarding the need for women to share in the support of their families, the United States Women's Bureau quotes: 52

"The struggle to live on the husband's wage alone, in most industrial families, is a failure. A canvass of nearly 12,000 families in six industrial sections of Philadelphia in 1918 showed that the majority, 55 per cent, relied on income from other wage earners or from lodgers. Only six per cent of this entire group was of the conventional statistical type, husband, wife, and three children under 16 years of age, supported by the husband alone. 53

"Families not supported by the father alone, as a rule, turn first to the wages of children (18.6 per cent), next to the wages of the wife (17.7 per cent), and third to income from lodgers (15.9 per cent)."[12] 54

Although census figures are available on the family relationship of employed women and the numbers of other wage earners in their families, such figures do not indicate the proportions of women's earnings which are contributed to their families or the extent to which women are called 55

[11] Frances Perkins, "Should Women Take Men's Jobs?", *The Women's Journal*, April, 1930, pp. 8–9.

[12] United States Women's Bureau, Bulletin No. 91, *op. cit.*, p. 19. Quoted from a study by Dr. Gwendolyn Hughes Berry, published in *Annals of the American Academy of Political and Social Science*, May, 1929, pp. 316–317.

upon to support others. For such information we must rely upon special studies which have been made of groups of wage earning women in various localities.

Data on the contributions of working women to their families are available from such sources for as far back as 1888. Of 61,679 women covered in 22 studies made between 1888 and 1923 and summarized by the United States Women's Bureau, only 9 per cent of the women were making no contributions from their earnings to the family income. More than half the women (53 per cent) were contributing all their earnings and 38 per cent contributing part of their earnings to their families.[13]

In order to secure more detailed information on the part played by women in family support, the Women's Bureau made a special study of the share of family support borne by men and women in Manchester, New Hampshire, a textile community in which large numbers of women are employed.[14] It was found that 68 per cent of the women contributed all their earnings to the family, and that the daughters contributed a considerably larger proportion of their earnings than the sons, 60 per cent of the daughters and 35 per cent of the sons contributing all their earnings to the family income:[15]

---

[13] United States Department of Labor, Women's Bureau, *What the Wage-Earning Woman Contributes to Family Support*, Bulletin No. 75, 1929, p. 12.

[14] United States Department of Labor, Women's Bureau, *The Share of Wage-Earning Women in Family Support*, Bulletin No. 30, 1923, Part I.

[15] *Ibid.*, p. 59.

	Per cent of— Daughters	Sons
Contributing 50 per cent or more of their earnings	75.6	60.9
Contributing all their earnings	59.9	34.6

In connection with another study made by the Women's Bureau, covering women employed in the meat packing industry in 1928, data were secured in eight cities on the proportion of the family income earned by women who were not the sole support of their families.[16] The average percentage of family income contributed by these women, according to the size of their families, was as follows:

Size of family	*Per cent of family income contributed by the women*
Total	40.6
2 persons	42.1
3 persons	43.1
4 persons	43.3
5 persons	42.4
6 persons	37.3
7 persons	39.0
8 persons	39.9
9 persons	28.3
10 persons	26.3

[16] United States Department of Labor, Women's Bureau, *The Employment of Women in Slaughtering and Meat Packing*, Bulletin No. 88, 1932, pp. 14, 15, 200–202.

66 Regarding the importance of women's earnings to their families the Women's Bureau states:

> "If an employed woman living at home does not earn enough for her own support, she is a financial burden on her family, and to that extent the family—whether able to do so or not—must subsidize both the girl and
67 the industry in which she works. . . . And if the girl's earnings are too low to permit of saving and she becomes ill or loses her job, this fact may be the final cause of submerging an already overburdened family.'"[17]

Even greater is the responsibility borne by
68 women who are the only breadwinners in their families or have others wholly dependent upon them for support. Because of the far-reaching consequences of this situation, many studies have been made of the extent to which women wage earners must support others who are wholly dependent upon them. For example, the
69 Connecticut Department of Labor made a study of the economic status of single women wage earners living with their families in 1915–16 and found that of 2,271 such women, 33 per cent were the only members of the family working.[18] In connection with the study of women in the meat packing industry, referred to above, the Women's Bureau found that 40 per cent of the self-support-
70 ing women had other persons wholly dependent upon them.[19] Data brought together by the United

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[17] United States Women's Bureau, Bulletin No. 91, *op. cit.*, p. 59.

[18] United States Women's Bureau, Bulletin No. 30, *op. cit.*, p. 152.

[19] United States Women's Bureau, Bulletin No. 88, *op. cit.*, p. 200.

States Women's Bureau from similar studies may 71
be summarized briefly as follows:[20]

> Of 16,964 women included in eight studies made between 1912 and 1921, 14 per cent were supporting persons who were wholly dependent upon them.
>
> In a study made by the Women's Bureau in 72
> 1919 covering 1,800 wage earning women, one in three of the single women reported her mother to be entirely dependent upon her and one in seven of the married women was the sole support of herself and husband.

For many women, both married and single, em- 73
ployment outside the home must be combined with
domestic responsibilities. Almost half a million
(414,675) gainfully occupied women in New York
State (29 per cent of all gainfully occupied women
15 years of age and over) were listed by the census
as "home-makers" in 1930; the home-maker was
defined as the member of the family group who
was responsible for the care of the household.[21] 74
Approximately 14 per cent of all women "home-
makers" in the State were gainfully employed;
the proportions in the larger cities were as
follows:[22]

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[20] United States Department of Labor, Women's Bureau, *Wages of Women in 13 States*, Bulletin No. 85, 1931, p. 158.

[21] United States Department of Commerce, Bureau of the Census, *Fifteenth Census of the United States, 1930, Population, Vol. VI, Families*, pp. 923–926. 75

[22] *Ibid.*

	Per cent
New York City	14.2
Buffalo	10.5
Rochester	17.2
Syracuse	15.2
Yonkers	14.7
Albany	14.9
Utica	17.7

Among these are many women with small children who are forced by economic need to seek employment. A special tabulation by the United States Women's Bureau of 1920 census data for four cities showed that of 11,060 breadwinning mothers in these cities, 40 per cent had children under five years of age.[23]

In connection with a special study of the children of working mothers, the Children's Bureau of the United States Department of Labor made a house-to-house canvass in Philadelphia in 1928.[24] Of 12,227 mothers found at home with at least one child under 16, half had been employed after marriage. Of the white mothers, 48 per cent of those with one child and 39 per cent of those with five or more children under 16 had been employed since marriage. Of the negro mothers, 82 per cent of those with one child and 75 per cent of those with five or more children under 16 had been employed since marriage. Eighteen per cent of the women working at the time of the investigation were the only wage earners and an additional 9 per cent were the chief although not the only breadwinners in their families.

[23] United States Women's Bureau, Bulletin No. 75, *op. cit.*, p. 17.

[24] United States Department of Labor, Children's Bureau, *Children of Working Mothers in Philadelphia*, Publication No. 204, 1931.

In other words, it has been shown again and 81
again that large numbers of wage earning women
are responsible for the support of others as well
as themselves and that the welfare of many per-
sons depends upon their pay envelopes. In dis-
cussing this aspect of women's work for wages
the United States Women's Bureau states:

"From the point of view of the family, the 82
woman's earnings bear a large share in sup-
port. Studies in various industrial communi-
ties have shown not only that the great
majority of wage-earning women, whether
single or married, contribute to the support of
others, but that in an appreciable number of
cases women's earnings constitute the entire 83
family budget.

"From the point of view of the individual
working woman, earnings represent a pur-
chasing power that, while dependent upon the
fluctuating value of money, holds under the
existing economic order whatever possibility
of satisfaction she may have in life, since in 84
her case income from other sources is likely
to be nonexistent or at best negligible. And
this is quite as true of the unmarried girl
who lives at home as of the one who lives in-
dependently, for if she does not earn enough
for her own complete support she is subsidized
by her family; and often this very fact may so
reduce their standard that some unforseen or 85
unpreventable circumstance may plunge the
whole family, the girl included, below the sub-
sistence level. In the great majority of cases,
the amount the employed woman can earn by
working during reasonable hours and under

suitable conditions actually does form her only financial support—the sole economic basis of her health, the length of her life, her possibility of bearing and rearing healthy children, and her personal efficiency and happiness.

"The early investigations of B. Seebohm Rowntree, the English economist and manufacturer, made at a time of unusual prosperity in the section of England studied, led to a picture of the average worker as starting life as a child below the poverty line, rising above it in early manhood, sinking below it again as his own children begin to arrive, emerging above it as the children cease to be dependent upon him, and falling below it again as old age approaches.

"For the woman in industry the condition is similar. If she be married, her child-bearing years represent, besides the added expense to the family, an actual decrease in its total income. If she be unmarried, she is often called upon to contribute to the support of younger brothers or sisters, and usually must assist with the support of parents, who, unlike the children of her married sisters or brothers, become, as the years advance, an increasing financial burden."[25]

[25] United States Women's Bureau, Bulletin No. 85, *op. cit.*, pp. 1–2.

II. DATA REGARDING WOMEN'S EARNINGS REVEAL SUCH DISCREPANCIES AND VARIATIONS IN WAGES PAID FOR IDENTICAL WORK AS TO INDICATE THAT NO RELATIONSHIP EXISTS BETWEEN THE VALUE OF THE SERVICES RENDERED AND THE WAGES PAID.

1. Women are paid widely varying rates for the same work. In many industries there are employers who pay wages not commensurate with the value of the services rendered since they are far less than those paid by the majority of the employers for the same work.

In order to determine whether the wages paid to women under similar conditions show conformity to some standard based upon the character of the work or are largely in a chaotic and unstandardized state, the Women's Bureau of the United States Department of Labor brought together and analyzed material from previous Women's Bureau studies and from other reliable sources, regarding variations in wage rates paid to women under corresponding conditions.[26] Plant by plant comparisons were made of the wage rates paid to women or of their actual earnings over comparable periods of time for the same work, in eight important women-employing industries or groups of industries in 17 states, including New York, in 1932 or 1933. The findings of the study were summarized as follows:

> "In each industry examined the wage payments in the typical sample establishments included showed striking differences from plant to plant, even when other conditions

[26] United States Department of Labor, Women's Bureau, *Variations in Wage Rates Under Corresponding Conditions*, Bulletin No. 122, 1935.

96 were as nearly similar as is possible with industrial data, and although in every part of the study all possible efforts were made to select only strictly comparable data. For example, . . . median weekly rates among 28 large New York laundries . . . show[s] a difference of 86.5 per cent from lowest- to
97 highest-paying plant. Even where other factors, such as type of product, size of city, or plant location, were taken into account, comparisons made in plants under conditions as nearly identical as obtainable showed differences in payment so marked as to be attributable only to lack of wage standards."[27]

98 "At least some indication of the value of the work done is shown in the amounts the better-paying employers can afford to give for the job. For others to fall so far below such a standard as frequently appears to be the case creates a situation grossly unfair not only to those who are performing the work
99 but to the better-paying employers as well."[28]

Establishments in two industries in New York State were included in the study: 28 large power laundries employing 1,900 women and 22 underwear mills employing 497 women seamers. In both industries there was wide variation between plants in the wages paid for the same work. The
100 average rates paid to shakers in the laundries for a 48 to 49½ hour week ranged from $14.65 in the plant paying the highest to $6.90 in the plant paying the lowest. One laundry paid all of its shakers between $14 and $18, others paid between

[27] *Ibid.*, p. 4.
[28] *Ibid.*, p. 1.

\$10 and \$16, \$10 and \$15, \$11 and \$14, whereas 101
one of the laundries was paying some of its workers less than \$7 a week and none as much as \$10. Another was paying all of its shakers between \$8 and \$9.

There were similar variations in the wages of women seamers in underwear mills in New York State. The average hourly earnings in the highest 102
paying plant were 38 cents; in the lowest, only 17½ cents. In the plants with the highest wages the average hourly earnings of the women ranged from 20 to 60 cents, from 18 to 60 cents, from 20 to 50 cents. In one plant at the other extreme none of the women averaged as high as 30 cents an hour and some averaged less than 5 cents an hour.

Additional evidence of the variation in women's 103
wages was obtained by the Division of Women in Industry and Minimum Wage of the New York State Department of Labor during the summer of 1935 in connection with a survey of women's wages in five manufacturing industries and in retail stores throughout the State. The extent to which
the average hourly earnings of women varied from 104
plant to plant in these industries and the low wages paid by some employers are shown in Chart III.[29]

For example, in the candy factories covered in New York City, the average hourly earnings of all women employees ranged from 59½ cents in
the highest paying plant to 29 cents in the two 105
lowest paying plants. Comparison of earnings of individual women employed in the same occupation revealed even greater variations. Hourly earnings of the packers in the plants covered

[29] See also Appendix, Tables VII and VIII.

ranged from 78 cents to 22½ cents. In half the plants none of the packers received less than 35 cents an hour, their hourly earnings ranging from 35 to 62½ cents, from 40 to 41 cents, from 36 to 45 cents in the higher paying plants. On the other hand, three of the plants paid none of their packers as much as 35 cents an hour.

In the paper box factories in New York City, the average hourly earnings of all women employees ranged from 55 cents in one plant to 32½ in others. Women employed as strippers were receiving from 32½ to 84 cents an hour. Twenty-one of the 28 firms paid all their strippers at least 40 cents an hour and 11 firms at least 50 cents an hour, whereas three firms were paying none of their strippers as much as 40 cents.

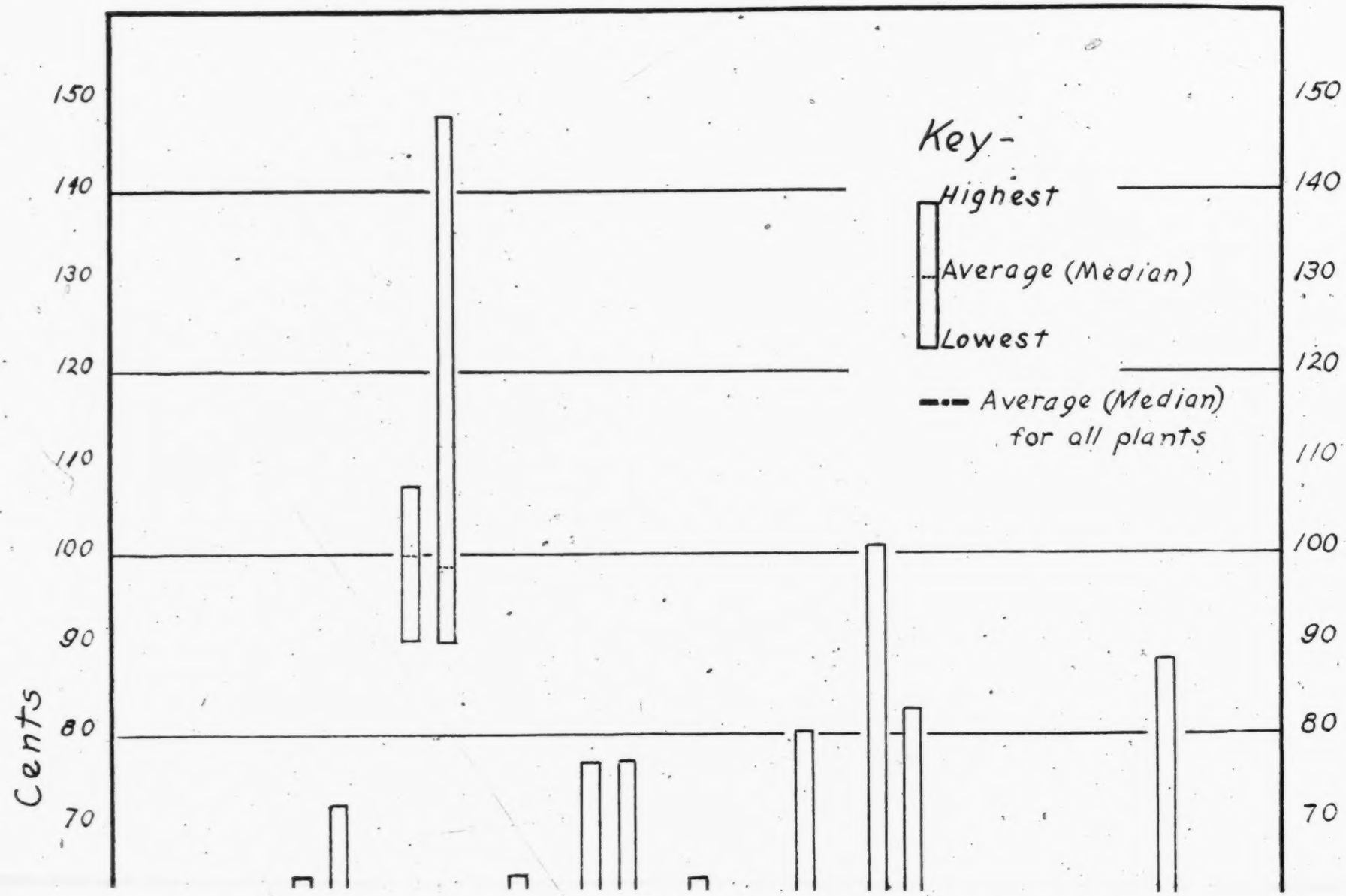
Average hourly earnings of operators in cotton garment factories in New York City ranged from 23 cents to $1.48. Operators in a third of the plants covered received at least 40 cents an hour. At the high range were two firms that paid none of their operators less than 90 cents an hour. At the other end of the scale were two plants paying from 23½ to 39 cents, and from 27½ to 39 cents.

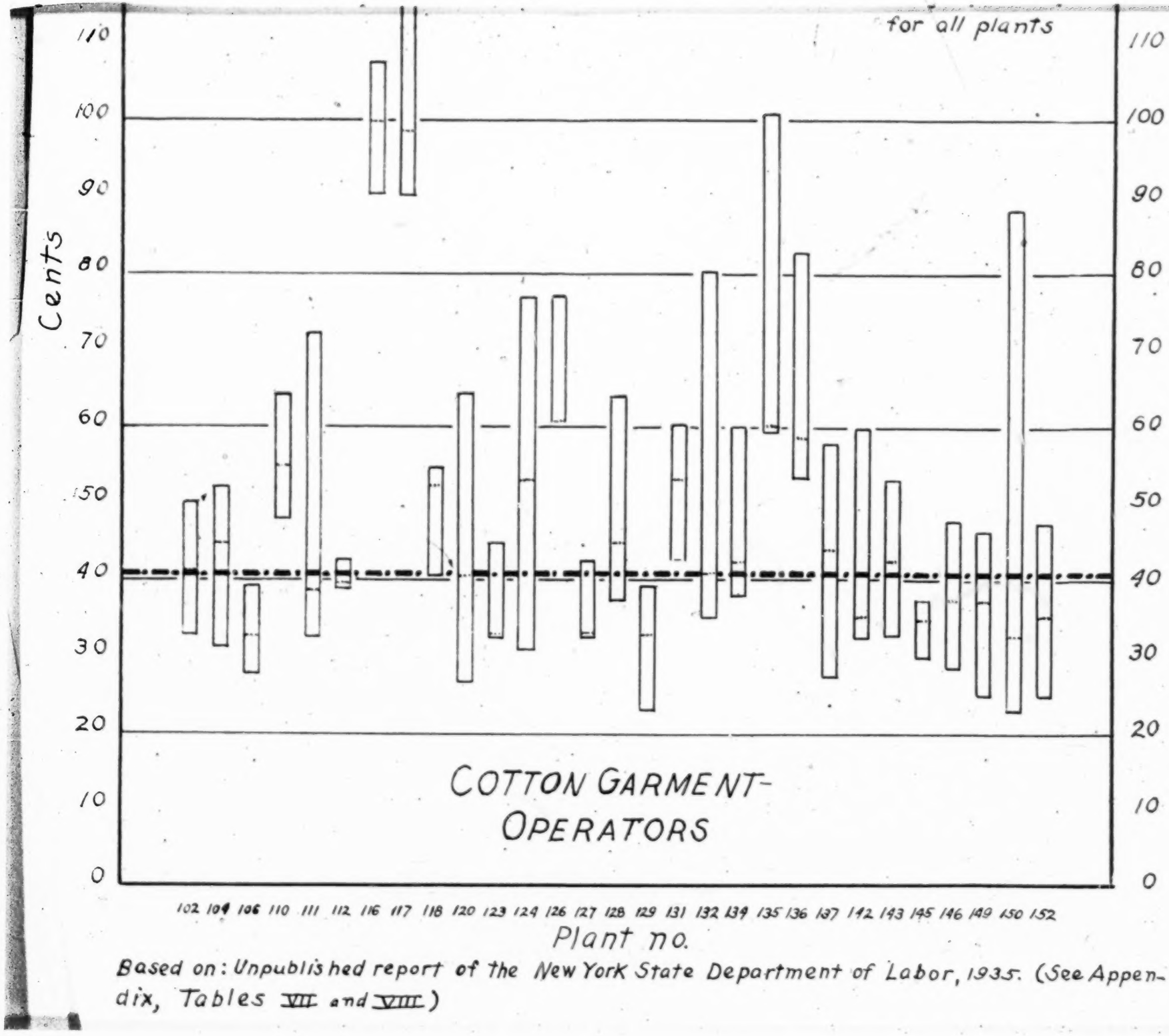
Finishers in the knitted outerwear industry in New York City earned from 20 to 77 cents an hour. Half the firms paid all their finishers at least 40 cents an hour. One firm, however, was paying more than a fourth of its finishers less than 25 cents an hour and almost half (43 per cent) less than 30 cents.

Marked variations in wages paid to women in the same occupations were also found in the handbag industry and in retail stores in New York City.

CHART III - PLANT BY PLANT COMPARISON OF HOURLY EARNINGS OF WOMEN IN THE SAME OCCUPATIONS IN FACTORIES NEW YORK CITY, 1935

FIGURE 1





Based on: Unpublished report of the New York State Department of Labor, 1935. (See Appendix, Tables VII and VIII)

CHART III

FIGURE 2

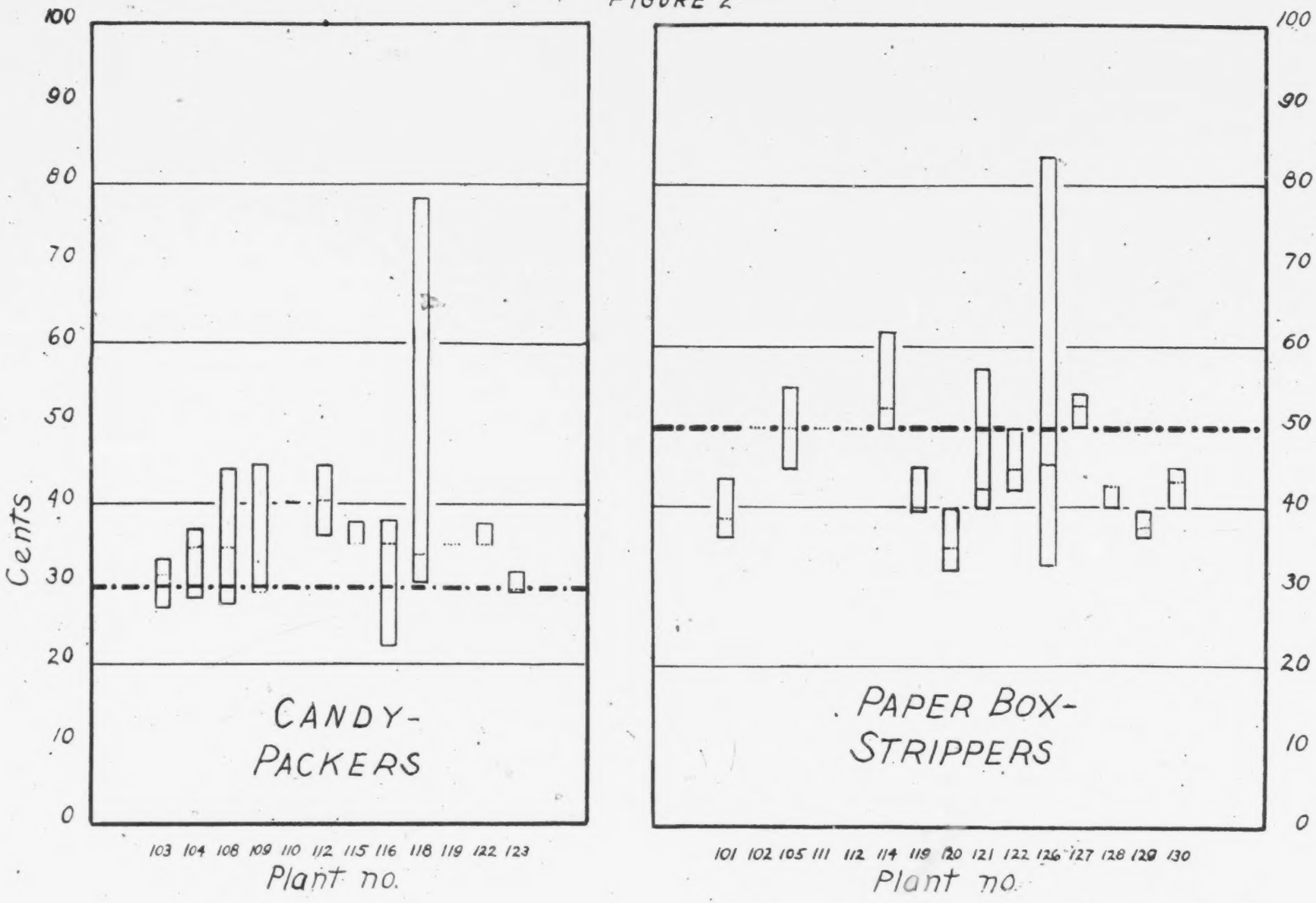
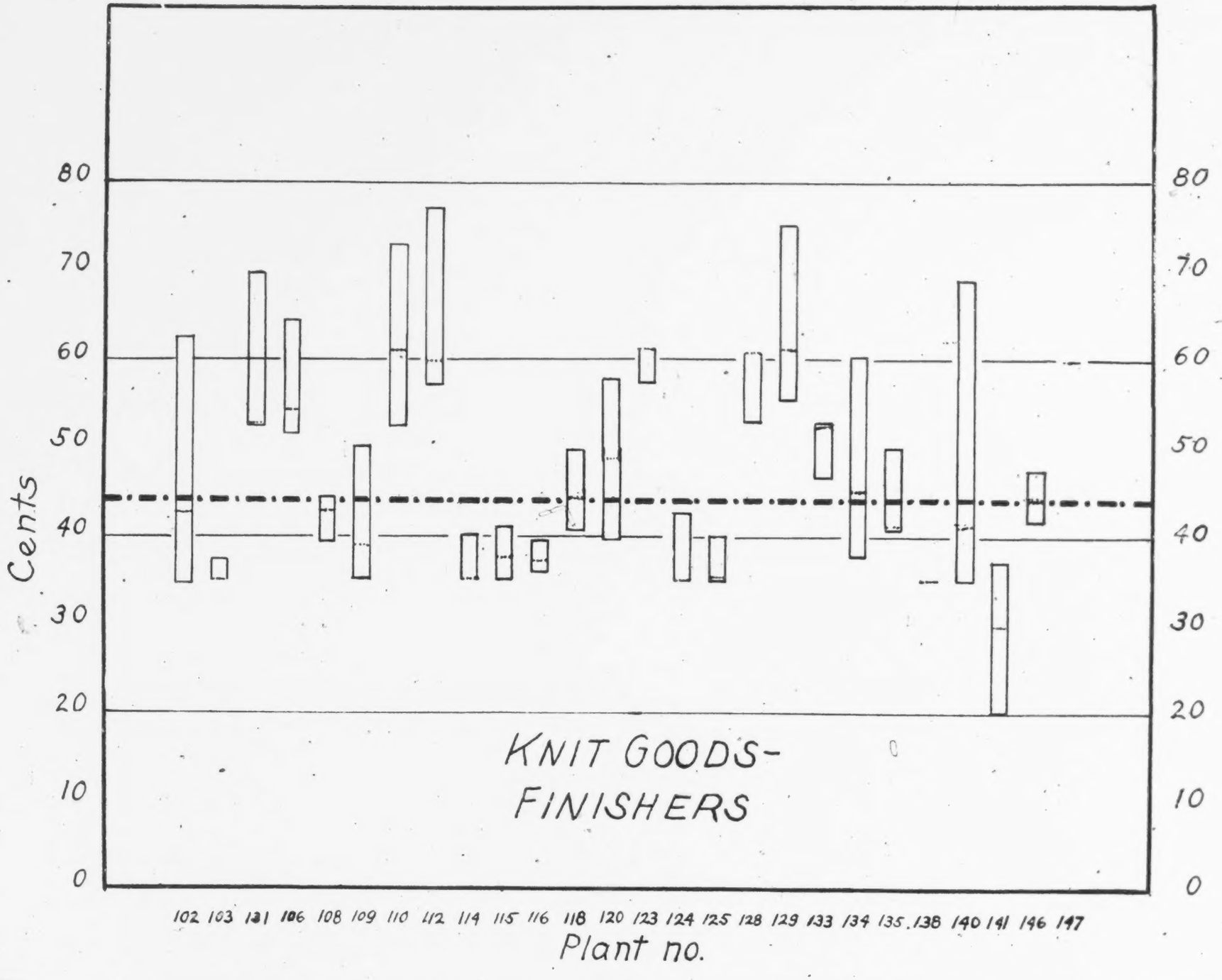


CHART III.

FIGURE 3



2. The fact that in many instances women are paid lower wages than men for the same work is a further indication that women receive wages which are not commensurate with the value of the services rendered. 111

Women's labor has traditionally been regarded as cheap labor, and there is abundant evidence that women's wages are lower than men's.[30] In general the occupations in which women are employed in industry are different from those engaged in by men. Wage data show, however, that even in those cases in which workers of both sexes are employed in the same occupation, the women are paid lower wages than the men. 112

The most comprehensive figures relating to wages paid to men and women in specific occupations are those obtained by the Bureau of Labor Statistics of the United States Department of Labor from monthly payroll reports of representative employers in various industries throughout the country. The figures for New York State, as for the country as a whole, show that in almost every case in which men and women are employed in the same occupation, the women receive considerably less than the men for the same number of hours of work. The chart which follows (see Chart IV) shows the differences in the average hourly earnings of men and women in various occupations in six New York State industries in which wages were analyzed between 1929 and 1932.[31] In all but one of the twenty-nine occupations in which at least 10 workers of either sex were employed in the plants covered, women's 113 114 115

[30] The difference in the general wage level of men and women is discussed in Section III.

[31] See also Appendix, Table IX. The average used in this case is the arithmetic mean.

116 average hourly earnings were less than men's, ranging from less than half (46 per cent) to 95 per cent of the men's earnings.

There are, of course, cases in which men and women do not perform identical work even though they are employed in the same occupation. In many cases, however, women have been employed to replace men or to work with them in the same
117 occupations because they could perform the work as well as men or better and could be hired at lower wages. In a special study of the replacement of men by women in New York State industries during the war, when the process of replacement was particularly widespread, the Bureau of Women in Industry of the State Department of
118 Labor found that 80 per cent of the employers in the plants investigated claimed that women were as satisfactory or more satisfactory than the men whom they replaced. Yet, even in the cases in which the women produced more than the men, they received lower wages than the men doing the same work in the same plant.[32] Typical reasons
119 given by employers for retaining women after the armistice were: "Greater production at lower wages"; "No man would take it" (referring to women's pay envelope); "Fifty cent (an hour) men can be replaced by twenty-five cent women"; "Better work at lower wages"; "They produce more and demand less."[33] Of the 5,329 women who were retained in these plants after the armis-
120 tice in what had previously been men's jobs, 83 per cent were receiving lower wages than men doing the same work; their weekly wages averaged $4.39 less than the men's.

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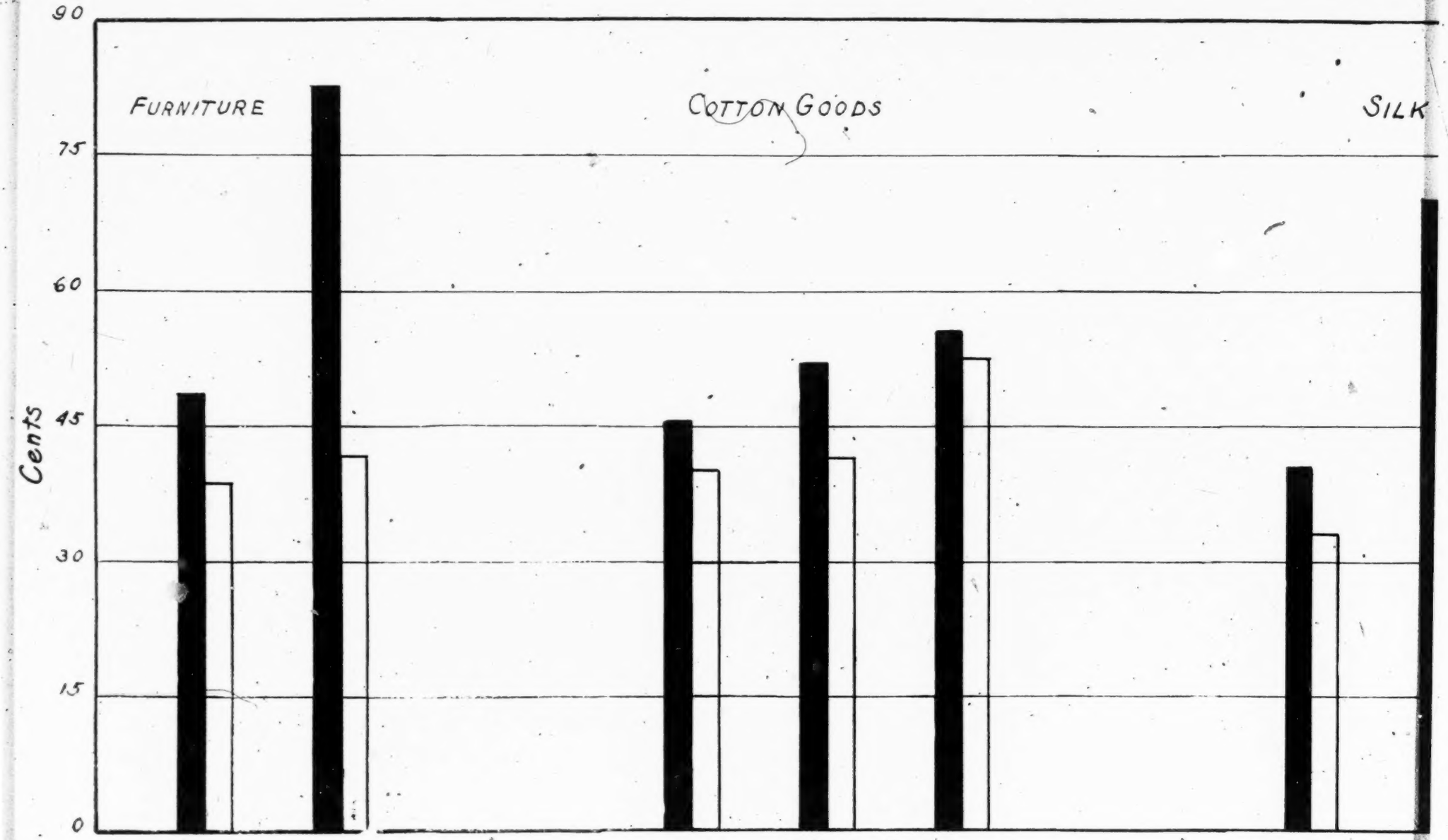
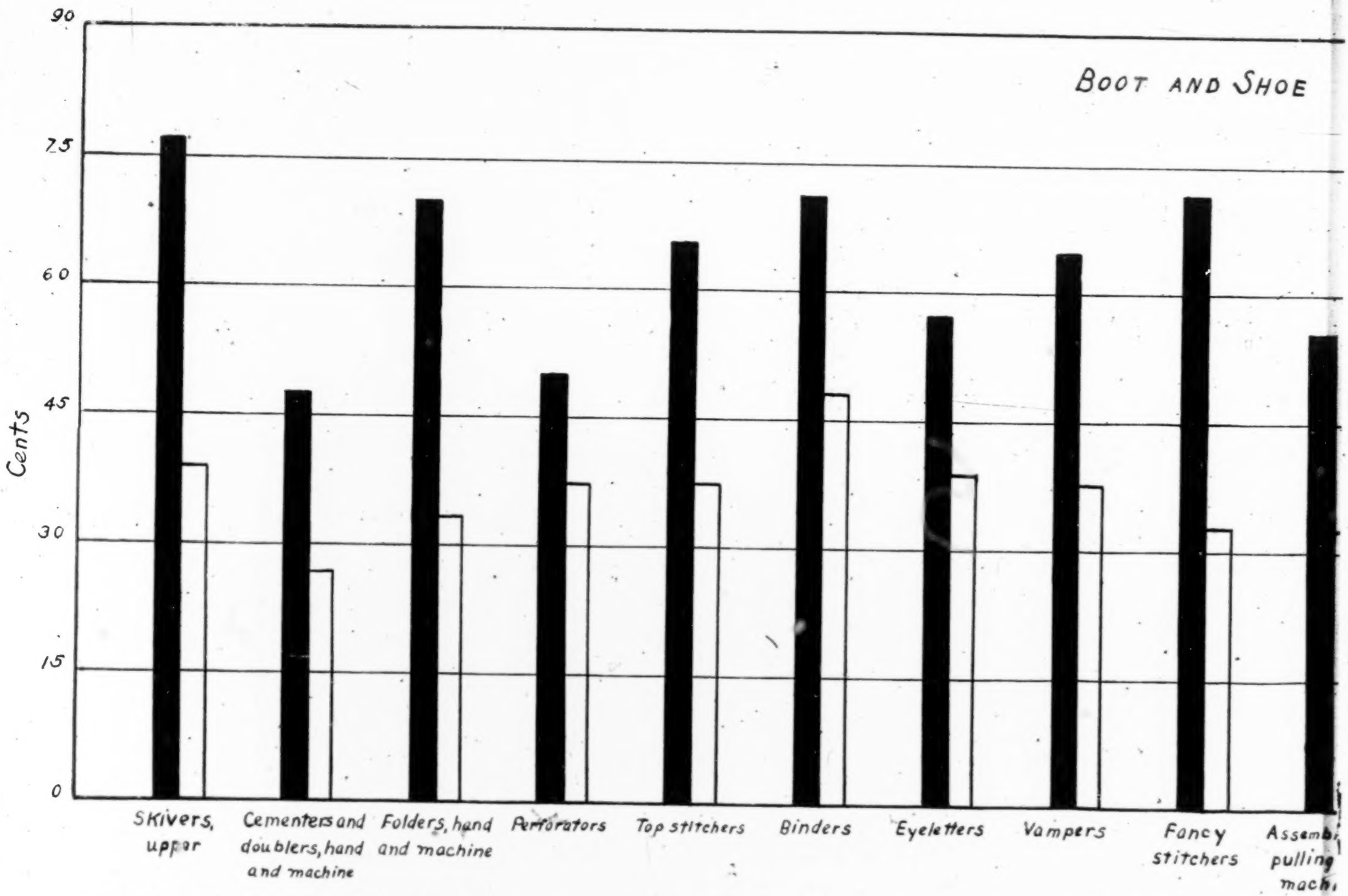
[32] New York State Department of Labor, Bureau of Women in Industry, *The Industrial Replacement of Men by Women in the State of New York*, Special Bulletin No. 93, 1919, pp. 27–29.

[33] *Ibid.*, p. 33.

CHART IV- AVERAGE HOURLY EARNINGS OF MEN A
IN THE SAME OCCUPATIONS IN SIX INDU

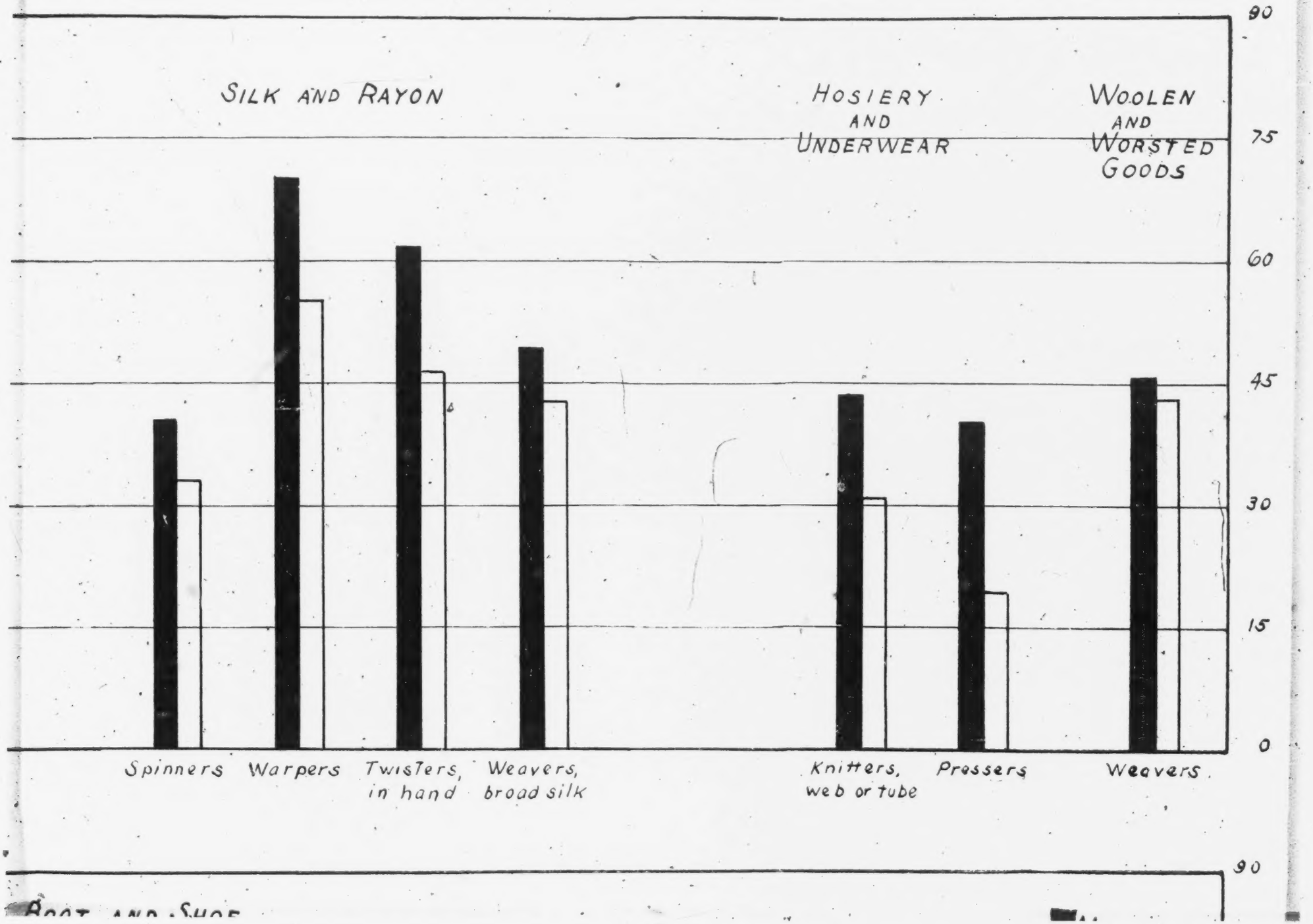


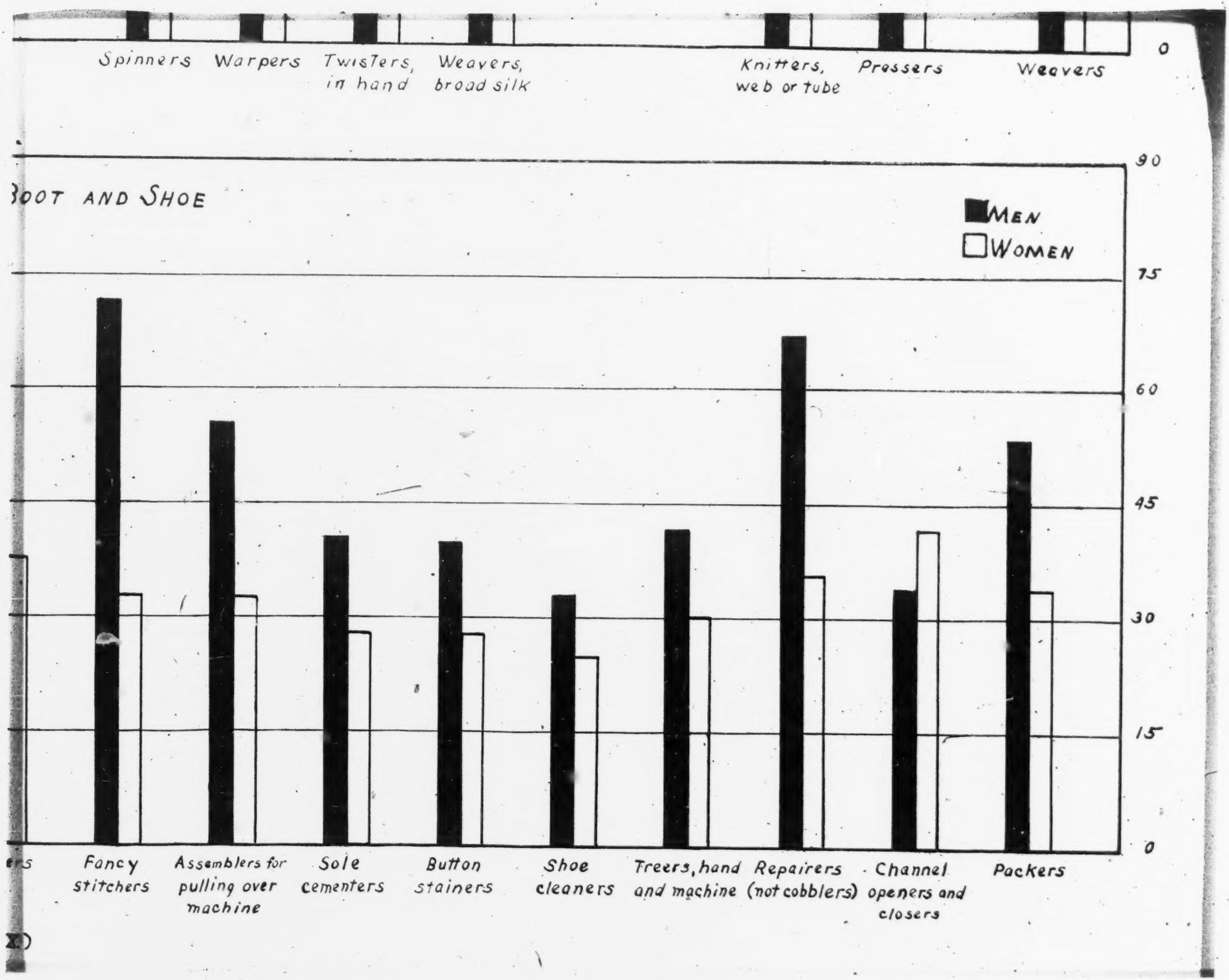
Sanders, hand Upholsterers Speeder tenders Spinners, frame Weavers Spinners We



Based on data from Bulletins of the U.S Bureau of Labor Statistics (See Appendix, Table IX)

VINGS OF MEN AND WOMEN EMPLOYED
NS IN SIX INDUSTRIES IN NEW YORK STATE




Spinners
Warpers
Twisters, in hand
Weavers, broad silk
Knitters, web or tube
Pressers
Weavers
0
90
BOOT AND SHOE
MEN
WOMEN
75
60
45
30
15
0
Fancy stitchers
Assemblers for pulling over machine
Sole cementers
Button stainers
Shoe cleaners
Treers, hand and machine
Repairers (not cobblers)
Channel openers and closers
Packers

Other studies show that it is a common practice 121
to pay women less than men when they are employed to perform identical work. The following example was reported to the United States Women's Bureau in a plant visited in the course of one of its investigations:

> "A new screw machine was installed . . .
> and men were assigned to the job on a piece 122
> work basis at a certain rate per thousand. After working on the machine a short time the men complained that they were not able to make a decent wage at the rate paid, and the employment manager and works manager decided to try women on it, transferring the men to other work. Women were put on at 123
> the same rate and, the employment manager said, 'They ran riot with the job and before long were making over $50 a week.' Then the men wanted another trial at the job, and as the employment manager does not approve of having women in the machine shop and tries to discourage it, the men were given 124
> another tryout at a slightly higher rate than the initial one. Again they failed to turn out enough work to earn a satisfactory wage. Women have been employed on this work ever since (about three years). Rates have been lowered several times since the women have been working on the machines, as it was stated that the work was in an experimental stage 125
> when the first rates were set. Machine setters were employed for both men and women. The women now make $25 to $30 a week.'"[34]

[34] United States Department of Labor, Women's Bureau, *The Effects of Labor Legislation on the Employment Opportunities of Women*, Bulletin No. 65, 1928, p. 228.

126 The Women's Bureau reported that visits to other plants of metal trades manufacturers showed few jobs there for women, but that where women were given jobs on which men had been or might be employed it was usually because of the lower wage that could be paid to women.[35]

On the relation of men's and women's wages, the Division of Women in Industry of the New
127 York State Department of Labor reported:

> "An effort to relate women's wages to their industrial efficiency has been disappointing in any comparative study of wage rates for men and women. Women's wages are almost always lower than men's. This is true even where men and women are doing the same
128 work and the woman produces as much as the man. In fact, it may make little difference whether a woman produces more or less than a man; the wage rates may not vary with her production. Being a woman is now too often a barrier against adequate payment for service. The great need is for *accurate and*
129 *scientific determination of the value of labor to the finished product regardless of the sex of the worker.*"[36]

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[35] *Ibid.*

[36] New York State Department of Labor, Division of Women in Industry, *Women Who Work*, Special Bulletin No. 110, 1922, p. 27.

130

III. WOMEN AS A GROUP HAVE ALWAYS BEEN PAID LOW WAGES AS MEASURED BY THE COST OF LIVING AND THE PURCHASING POWER OF THE DOLLAR. 131

1. Women have always been a low wage group in the labor market.

To secure data on current wage conditions, the New York State Department of Labor during the 132 summer of 1935 made a study of the wages paid to women in five manufacturing industries (candy, cotton garment, handbag, knit goods and paper box) and in retail stores. This study, covering 7,367 women in representative establishments throughout the State, showed that a large proportion of the women were receiving low wages. 133 A summary of the wages paid is presented below.

Week's Earnings of Women in Six Industries, New York State, 1935 [1]

Industry	Per cent of women whose week's earnings were—					134
	Under $5	$5 and under $10	$10 and under $12	$12 and under $15	$15 and over	
Candy	6.1	24.0	9.3	40.9	19.7	135
Cotton garment	5.8	20.3	11.1	30.4	32.4	
Handbag	10.3	18.2	7.3	40.7	23.5	
Knit goods	10.3	12.1	8.4	23.7	45.5	
Paper box	1.8	13.7	8.5	41.9	34.1	
Retail stores	16.5	10.9	12.7	28.5	31.4	

[1] Based on Table X, Appendix.

This situation was not peculiar to the summer of 1935, but has persisted in good times and bad. Special studies made by the State Department of Labor and by the United States Women's Bureau of the wages earned by women workers in New York State industries during the last 20 years show that there has always been a considerable number of women in the State earning less than $5 and less than $10 a week. During these years there have been wide fluctuations in the price level, there have been periods of prosperity and depression, with corresponding variations in wages, and there have been many social and economic changes. But as appears from the following table, in practically every industry, regardless of the year in which the study was made, there were some women who were being paid wages of less than $5 a week, and a considerable proportion of women who were receiving less than $10 a week.

Week's Earnings of Women Employed in Various Industries in New York State, 1913–1934 [1]

Industry	Date of study	Per cent of women whose week's earnings were—			
		Under $5	Under $10	Under $12	Under $15
Hotel	1934	13.6	50.5	68.8	88.3
Restaurant	1934	23.7	61.7	74.3	87.3
Laundry	1933	5.0	44.3	69.0	90.9
	[2] 1931	1.4	9.6	23.9	59.8
	[2] 1929	2.5	8.4	15.7	46.4
	1926	4.0	12.0	20.5	54.6
Glove	[3] 1933	5.6	26.5	[4]	69.0
Shirt	1933	[4]	64.0	81.0	94.0
	1923	3.6	18.7	31.0	50.9
	1918	7.5	38.3	57.7	78.2
	1913	24.1	83.1	92.2	98.2
All industries—Newburgh	1929	[4]	[4]	44.9	[4]
Tobacco	1929	2.0	9.2		32.9
	1923	2.5	11.6	19.8	36.5
	1918	3.3	17.4	31.8	53.7
Paper box	[2] 1927	2.4	11.3	21.3	41.8
	1923	3.3	15.6	29.5	56.8
	1918	5.5	35.8	59.2	82.9
	1913	18.9	85.9	95.8	99.5
All industries—Binghamton	1926	3.7	12.8	20.7	41.1
Knitted outerwear	[2] 1923	.....	0.3	2.9	10.5
Candy	1923	4.0	18.4	35.4	63.0
	1918	13.3	51.4	72.3	89.0
	1913	28.3	92.5	97.9	99.4
Mercantile	1923	0.2	8.1	18.1	40.2
	1918	0.9	29.5	50.3	75.1
	1913	14.2	73.8	84.2	92.7
5 and 10 cent stores	1921	5.4	19.5	[4]	70.1
Millinery	[2] 1914	14.4	52.6	67.2	84.8
Button	[2] 1913	18.2	88.5	93.7	97.9

[1] Based on Table XI, Appendix.
[2] New York City only.
[3] Fulton County only.
[4] Not available.

146 Since June 1923 the New York State Department of Labor has been publishing figures on the average[37] weekly earnings of men and women in New York State factories, based on data collected from a fixed list of representative factories which report for the week including the 15th day of each month. These figures show that in every year
147 throughout the past 12 years women earned wages a little more than half as high as the wages paid to men. This relationship between the average weekly earnings of men and of women appears in all manufacturing industries combined (see Chart V) and also in the large women-employing industries such as clothing, candy, knit goods, paper
148 box and shoes.[38]

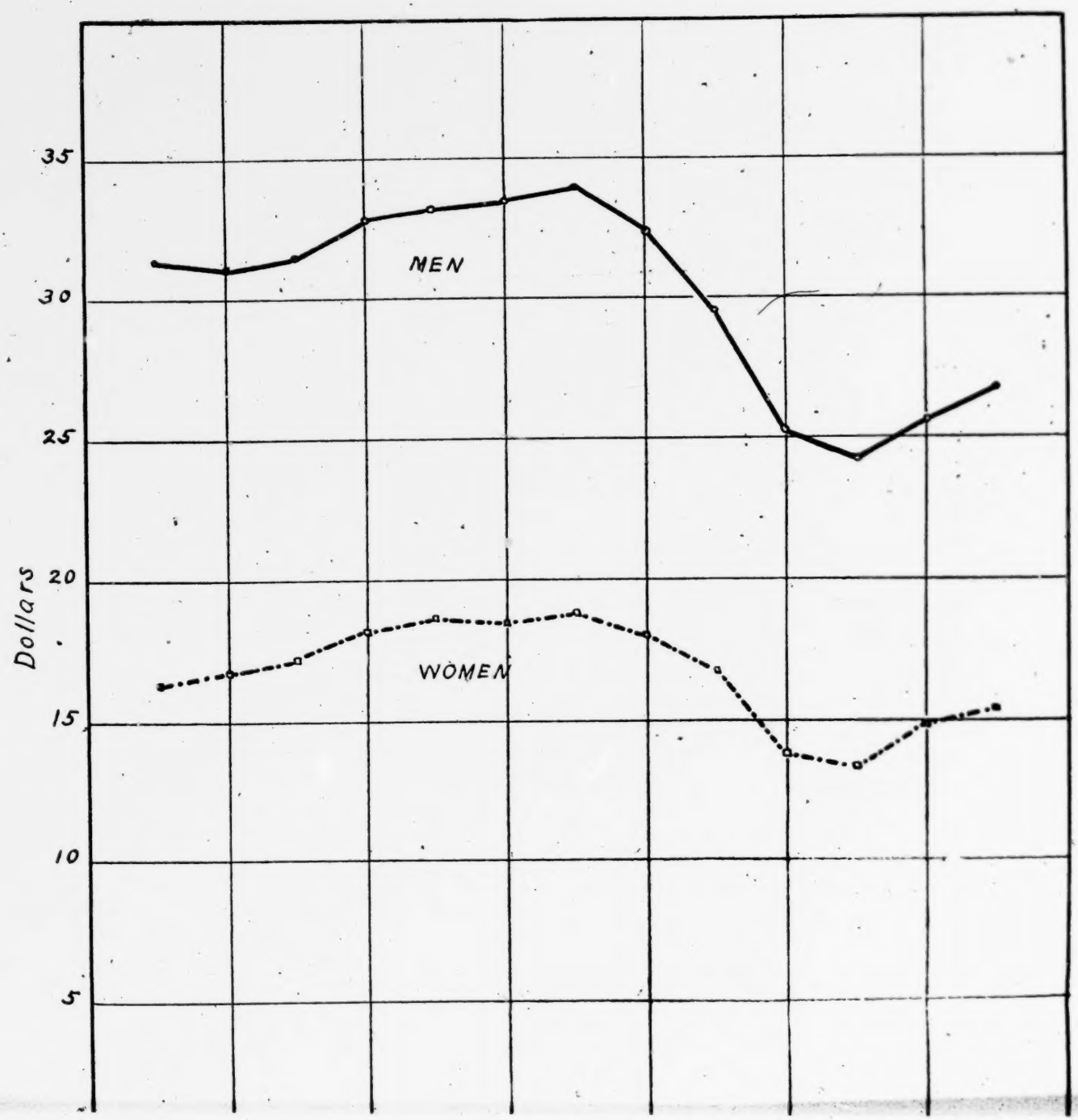
The reasons for the wide difference in the wages of men and women have been much discussed. In a study of the earnings of men and women in New York State factories for the years 1923–1925, it was pointed out that:

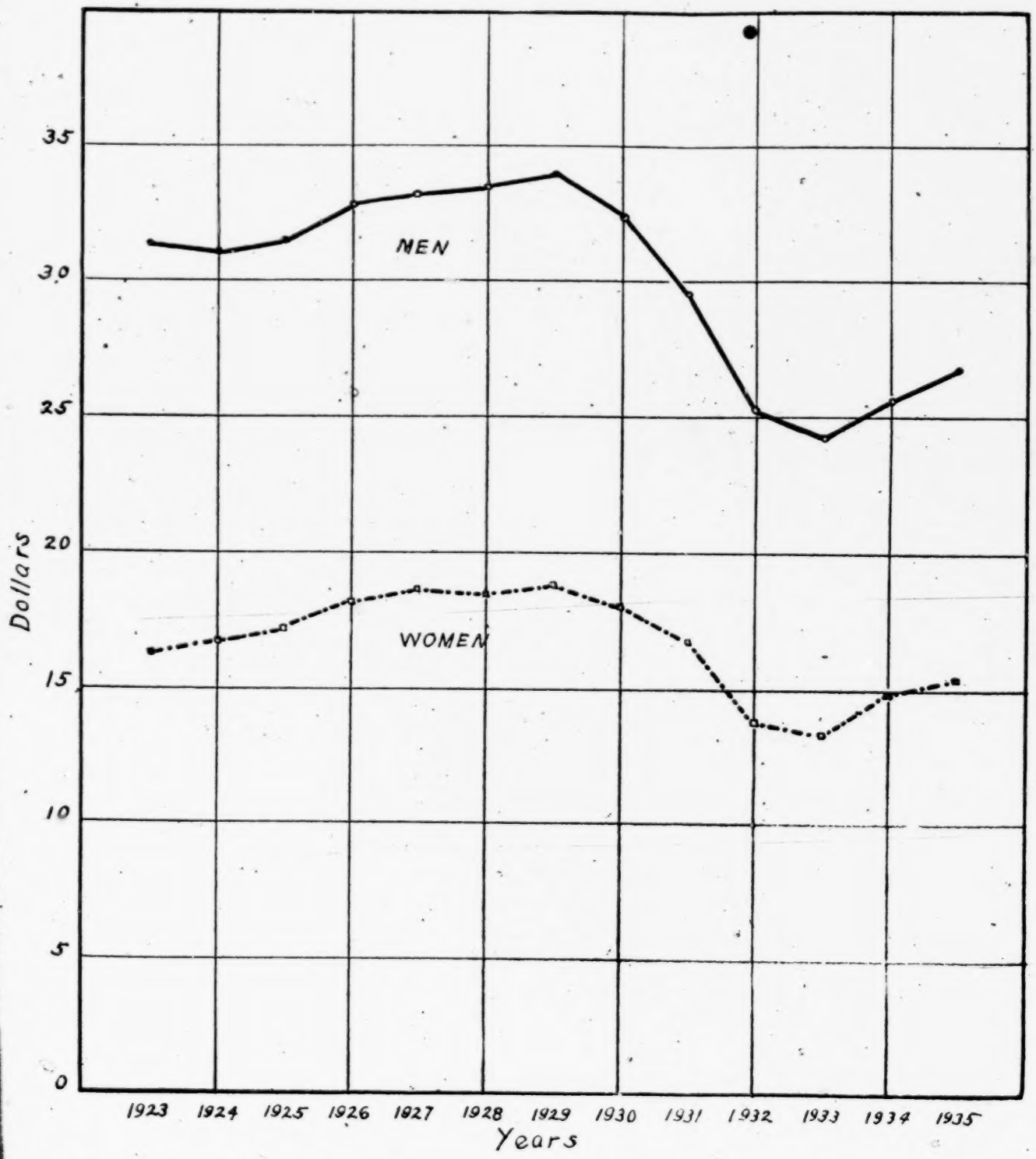
> ". . . women are engaged in different
> 149 occupations from those performed by men. The question is not, however, whether women are doing as heavy or as skillful work as men but whether difference in skill alone justifies a return only about half as great as that paid the men.
>
> "There is little evidence for deciding what are the reasons for the lower earnings of
> 150 women. A few facts, however, stand out. Women receive the highest earnings in industries where they are organized, like clothing and publishing. They receive the lowest

[37] For these figures the type of average used is the arithmetic mean.

[38] See Appendix, Table XII.

CHART V - AVERAGE WEEKLY EARNINGS OF MEN AND WOMEN IN REPRESENTATIVE NEW YORK STATE FACTORIES 1923 - 1935





Based on data from The Industrial Bulletin of the New York State Department of Labor - (See Appendix, Table XII)

wages in industries located in small towns or 151
in one-industry centers where the cost of living is lower and the possible alternative jobs are fewer.

"There are no women in the highest paid industries for men, again excluding the clothing manufacturers. This might be explained on the ground that women cannot do the work 152
requiring the greatest strength and skill, or that they are not admitted to the highest paid jobs, or that their limited bargaining power tends to pull down the earnings of men in the occupations where women are concentrated."[39]

However, as shown in the preceding section, 153
women's wages are lower than those paid to men, even when they are employed in the same occupations.

[39] New York State Department of Labor, Bureau of Statistics and Information, *Employment and Earnings of Men and Women in New York State Factories, 1923–1925*, Special Bulletin No. 143, 1926, p. 21.

154

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2. Considerable numbers of women receive wages which do not meet the cost of living at subsistence levels, and still larger numbers of women do not receive wages adequate to meet the minimum cost of living necessary for health.

Social welfare agencies in New York City, including the New York City Emergency Relief

Weekly Minimum Subsistence Budgets for a Woman Living Alone in New York City

(As reported by various social agencies to the New York State Department of Labor)

	The Welfare Council, "Subsistence level"	Emergency Relief Bureau, "Absolute minimum weekly schedule"	Jewish Social Service Association	Charity Organization Society, "Minimum budget"
Total	$11.00	$10.00	$10.05	$10.25
Food and shelter	8.50	7.45	8.45	7.75
Food	.....	2.70	3.50	2.75
Shelter	.....	[1] 3.20	4.20	4.00
Lunches	.....	1.20	.75	.....
Gas for cooking	.....	.35	.....	[2] 1.00
Household operation	.....	.....	.....	
Clothing	1.10	1.15	.....	1.10
Carfare	.60	.60	.60	.60
Other expenses				
Insurance	[3] .15	.....	.....	.15
Health care	.15	.....	.75	.15
Recreation	.....	[4] .50		[6] .50
Personal incidentals	[5] .50	.30	.25	

[1] Includes heat and light.
[2] Includes heat, light, cleaning and household supplies.
[3] Includes savings.
[4] Includes newspapers, periodicals, dues, etc.
[5] Listed as "Other expenses."
[6] Listed as "Incidentals, including recreation, newspapers, etc."

Bureau, reported in July and August, 1935, that their weekly allowance for the living expenses of a single woman was between $10 and $11 a week. These amounts are for living expenses at a minimum subsistence level. They are intended to provide primarily for minimum physical needs such as food and lodging, and make little or no provision for clothing, health care, recreation and incidentals. The budgets are shown on page 37.

The survey of women's wages by the State Department of Labor in the summer of 1935 disclosed that a large proportion of women employed in factories and stores in New York City are being paid wages below this minimum subsistence level. As appears from the following table,[40] the percentage of women in the various industries who received less than $10 a week ranged from approximately 13 per cent of the women in retail stores to 31 per cent of the women in handbag factories:

Industry	*Per cent of women with earnings of less than $10 a week*
Candy	27.8
Cotton garment	28.4
Handbag	30.8
Knit goods	23.5
Paper box	24.3
Retail stores	12.5

In 1926 the National Industrial Conference Board, Inc., a research organization maintained by manufacturers and business executives, made a study of "the average minimum cost of maintaining a fair American standard of living" for

166 single men and women and for families in New York City.[41] On the basis of these figures the cost for a single woman, employed as an industrial worker and living apart from the family group, has been calculated as $16.53.[42] According to a study made by the Department of Labor during the same year, 63 per cent of the women employed
167 in power laundries in New York City were earning less than $16 a week.[43]

Indices of changes in the cost of living, published by the Bureau of Labor Statistics of the United States Department of Labor, show that the cost of living in New York City has declined about 19 per cent since the National Industrial Con-
168 ference Board made its study in 1926. The present cost of the items included in that budget would be $13.41,[44] a much smaller sum than that fixed by the Welfare Council of New York City for a comparable standard of living in 1935 (see below). Nevertheless, large numbers of women employed in factories and stores in New York City in 1935 were earning less than this amount, ac-
169 cording to the study made by the State Department of Labor. As appears from the following table,[45] the proportion was lowest in retail stores, with 28 per cent of the women receiving less than $13 a week, and highest in cotton garment factories, with approximately 47 per cent of the women receiving under $13. In two industries,

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[41] National Industrial Conference Board, Inc., *The Cost of Living in New York City, 1926*, New York, 1926.

[42] See Appendix, Table XIII.

[43] New York State Department of Labor, Bureau of Women in Industry, *Hours and Earnings of Women Employed in Power Laundries in New York State*, Special Bulletin No. 153, 1927, p. 54.

[44] See Appendix, Table XIV.

[45] See also Appendix, Table X.

candy and paper box, 44 per cent of the women were paid wages which would be insufficient to meet the present cost of the standard set by the National Industrial Conference Board. 171

Industry	*Per cent of women with earnings of less than $13 a week*
Candy	44.4
Cotton garment	46.5
Handbag	40.7
Knit goods	35.7
Paper box	44.4
Retail stores	28.2

172

The Welfare Council of New York City, which reports $11 as the cost of living at a "subsistence level," also presents a budget of $16 a week as the cost of living at a "minimum self-supporting level."[46] The following table[47] shows that the majority of the women covered in the study made by the Department of Labor during the summer of 1935 were not earning enough to live at this "minimum self-supporting level" of $16 a week. 173 174

Industry	*Per cent of women with earnings of less than $16 a week*
Candy	87.4
Cotton garment	72.8
Handbag	76.3
Knit goods	55.1
Paper box	71.1
Retail stores	67.4

175

This discussion has been limited to a comparison of the cost of living and of the wages of women in New York City. While it is recognized

[46] See Appendix, Table XV.
[47] See also Appendix, Table X.

176 that the cost of living varies in different localities, the National Industrial Conference Board in a study of living costs in "12 widely different cities" found "a remarkable similarity in living costs. . . . The conclusion seems to be that while the value and accommodations obtained for a given expenditure may vary somewhat, there
177 is no great difference in the cost of maintaining a fair American standard of living throughout the eastern part of the United States."[48] Of the three cities in New York State included in this survey, New York City, Syracuse and Lockport, the cost of living in Syracuse was 3½ per cent less than in New York City, and in Lockport, 5½ per cent
178 less.[49]

[48] National Industrial Conference Board, Inc., *The Economic Status of the Wage Earner in New York and Other States*, New York, 1928, p. 91.

[49] *Ibid.*, p. 85

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3. The employment of women at wages less than the cost of living is a social problem. This is indicated by the fact that a considerable number of employed women turn to relief agencies for help and are now on the relief rolls. 181

The New York State Department of Labor, in cooperation with the Emergency Relief Bureau of New York City, examined the records for 182
280,568 families who were on the relief rolls during the spring and summer of 1935. It was found that in these families there were 4,254 women employed in industry whose wages were insufficient for the support of themselves and their dependents. They had therefore been accepted for relief and their wages were being supplemented by payments from the Emergency Relief 183
Bureau. One-fourth of the women were earning less than $5 a week, about two-thirds (64 per cent) less than $10 a week, and three-fourths (76 per cent) less than $12 a week.[50] These women were employed in practically all industries and occupations, but the largest numbers were in manufacturing and service industries.[51] 184
These figures do not account for the women employed in industry who are being assisted by private relief agencies.

Surveys made by the Federal Emergency Relief Administration indicate that:

> "There are workers in practically all important occupational groups whose earnings are being supplemented by relief, but the number of people requiring this aid is greatest amongst the least-skilled groups."[52] 185

[50] See Appendix, Table XVI.

[51] *Ibid.*

[52] Monthly report of the Federal Emergency Relief Administration, June 1 through June 30, 1935, Washington, 1935, p. 15.

186 The Federal Emergency Relief Administration in its monthly report for June 1935 points out that:

> ". . . supplementing inadequate private earnings is a widespread phenomenon, approximately half a million employed urban workers receiving relief in May 1934. This
187 practice has been adopted by local relief administrations to meet the problem of deficiencies in family budgets. Thus, those families whose budgets fall below the standard established by the social service division of the local relief administration become eligible for supplementary relief. . . .
188 ". . . Whether the need to supplement these low wages is due to temporarily depressed conditions in industry, or to permanently depressed conditions, or to the exploitation of the demoralized labor market by industry for competitive advantages is not revealed by the data. . . .
189 "The importance of the problem of supplementing wages by relief arises largely from the fact that this practice may in certain cases tend to encourage the offering and acceptance of jobs at low wages. If widespread over a long period, this would tend to depress the wage rate structure. . . . The possibility
190 of potential wage cutting, however, is acute, where the expectation of obtaining relief grants induces employers to offer, and workers to accept, jobs paying less than subsistence wages."[53]

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[53] *Ibid.*, pp. 9, 10.

The policy of the Administration in relation to this problem was stated as follows:

> "The Relief Administrator has already announced that the Federal Emergency Relief Administration is opposed to supplementing by relief the full-time earnings of workers employed in private industry. This policy is based upon the fact that workers with supplemented earnings create a dangerous situation in the labor market. A labor market in which subsidized workers compete with other workers is both unhealthy and undesirable, for all competing employers will be forced, or at any rate encouraged, to lower wages to meet the lower costs of production of the employers with a large number of subsidized workers. Since depressed wages would also tend to spread to competing industries, all possible pressure should be exerted to prevent such a depressing effect upon wage rates, with its threat of demoralization to workers generally."[54]

[54] *Ibid.*, p. 15.

196 ## IV. WAGE EARNING WOMEN CANNOT REMEDY THE SITUATION BY THEIR OWN UNAIDED EFFORTS.

1. Their bargaining power is weak, since they are largely unorganized.

Individual employees are seldom upon a level of equality in bargaining with their employers in regard to minimum fair wage standards. But in
197 industries or occupations in which employees are organized in trade unions, employees dealing as a group with employers have been able to improve their wage situation and to establish wage standards. Women workers, however, are largely unorganized. According to figures compiled from trade unions by the New York Department of
198 Labor in 1935, 148,658 women in the State are members of trade unions,[55] or only 10½ per cent of the 1,415,105 women gainfully occupied. Of the total number of women in trade unions, 69,800 or nearly half (47 per cent) are in the women's outer clothing industry.

In 1920 the Division of Women in Industry of
199 the New York State Department of Labor, pointing out that "the trade union movement has done much toward standardizing conditions of work for women",[56] secured figures from trade unions in order to determine to what extent women in New York State were organized at that time. The survey, limited to cities of over 50,000 population,
200 showed that 113,354 women were members of trade unions, representing 13 per cent of the women gainfully employed in those cities.[57] In view of the fact that labor organization is likely to be con-

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[55] These figures were obtained by the Division of Women in Industry and Minimum Wage through correspondence and interviews with trade union officials during the summer and fall of 1935.

[56] New York State Department of Labor, Division of Women in Industry, *Women Who Work*, Special Bulletin No. 110, 1922. p. 27.

[57] *Ibid.*, p. 28.

centrated in the large cities, the proportion of 201
women in trade unions was probably about the same in 1920 as it is in 1935.

One of the principal causes for the lack of organization among women, the Division of Women in Industry stated in its survey in 1920, was that:

> ". . . the greater the skill of the worker, 202
> the greater is the degree of organization, and women for the most part are performing the unskilled, routine jobs in industry."[58]

The Women's Trade Union League of New York, which for 30 years has had as one of its principal aims the organization of workers in trade unions, likewise points out in its annual 203
report for 1929–1930, that it is:

> ". . . the less skilled and unorganized trades into which the majority of our women workers go. Not only do girls and women leave specific shops or trades, but from year to year, some of these lesser, subsidiary trades 204
> themselves go out of existence. The League has often found, after painfully building up a local union, often without help from any other source, that its membership, due to poor pay, marriage, and the high mortality rate of these businesses, has drifted to other industries. . . . Women today are going into the two extremes which characterize 205
> modern industry—the large, highly mechanized, highly centralized industries which form the impressive majority, and the small, sweated establishments which, though they

[58] *Ibid.*

206 may proportionally be of lesser importance, are greater in number than they were a decade ago.'"[59]

Only a small proportion of women workers are organized but where trade union agreements exist, wage conditions are improved. For example,
207 according to a study of the paper box industry in New York City by the State Department of Labor in 1926,[60] average weekly rates of pay for women in union shops were from nearly $2 to $4.50 higher than in non-union shops. In union shops none of the women had rates of less than $13 a week, as compared with 3 per cent of the women in the non-union establishments. Rates were less than
208 $16 for 6 per cent of the organized women, and for 16 per cent of the unorganized women.

As noted above, about half (47 per cent) of the total number of organized women in New York State are employed in the women's outer clothing industry. Average weekly earnings of women workers in this industry for the year 1934 were
209 $20.38, or nearly $5.50 higher than the average for women in all manufacturing industries.[60a]

An anlysis of piecework earnings in the dress manufacturing industry in New York City was made by the Women's Bureau of the United States Department of Labor before and after a trade union agreement in August 1933, "to find out the
210 differences in the earnings of the workers due to

[59] The Women's Trade Union League of New York, Annual Report, April 1, 1929 to April 1, 1930, p. 6.

[60] New York State Department of Labor, Bureau of Women in Industry, *The Paper Box Industry in New York City*, Special Bulletin No. 154, 1928, pp. 35–36, 68–69.

[60a] See Appendix, Table XII. The average used in this case is the arithmetic mean.

the agreement and also the effect on the industry, 211
particularly as regards production, of the shortening of hours."[61] It was found that the weekly earnings of employees increased after the agreement; the increases in average weekly earnings of operators, for example, ranged from 30 to 95 per cent.[62] The effect on production, according to the Women's Bureau, was: 212

> ". . . The rate of production has increased in varying degrees in all industries following the reduction in the hours of work and the increase in minimum hourly rates paid to workers, and such increased production has been found in a considerable proportion of the dress manufacturing plants 213
> included in this survey."[63]

[61] United States Department of Labor, Women's Bureau, *Piecework Earnings in the Dress Manufacturing Industry in New York City*, mimeographed report, 1934, p. 2.
[62] *Ibid.*, pp. 4–5, 8–9.
[63] *Ibid.*, p. 9.

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2. Their bargaining power is weak, since they are concentrated in the highly seasonal industries and are subject to great irregularity in employment.

In a study of the employment and earnings of men and women in New York State factories during the years 1923 to 1925, made by the Bureau of Statistics and Information of the New York State Department of Labor, the conclusions were:

"In the matter of employment women furnish an extra large proportion of the workers in the irregular or satellite industries and in those industries where the development of highly industrialized organization has proceeded to only a slight degree. They furnish also a large share of the irregular forces in the more highly organized industries. . . .

"Perhaps the most impressive fact brought out in the whole study is the large reserve of labor necessary to maintain the working force that appears on the payrolls of each industry. At all times, whether the volume of employment is increasing or decreasing, currents of labor are moving in both directions. . . . A few industries are always expanding operations when business is dull. . . . Their demands help to offset reductions in the volume of employment, but only by providing work for people previously unemployed. In the same way, when the market is improving, many workers are being let out in other factories and again become the reserve of surplus labor that persists through good times and bad. In this outer circle of the half-employed the proportion of women is relatively greater than that of men. . . .

"To compare the effects of a business de- 221
pression on men and women is much easier after looking at the total figures than it is after going further into the reports from separate industries and firms. The results bear out fully the general impression that women are more irregularly employed in industry than men. This appears even in good 222
times. . . . It is also true that women are concentrated more in the irregular, unskilled and highly seasonal occupations. . . .

"This study shows that women are much more likely to feel the effects of seasonal employment than men. In the type of seasonal industry where the whole force is subject to irregular employment as in the cloth- 223
ing trades women tend to get more of it than do the men. In the other type of seasonal work, like the candy factories, where a steady force is maintained throughout the year and extra workers hired for the peak of the busy season, these extra workers are almost entirely women. . . . 224

"Payrolls show, even more than employment, the irregularity to which women workers are subject. The difference in earnings from dull to busy season is much greater for women than for men. . . .

". . . . Clothing,[63a] textiles and food are all seasonal and all employers of women's labor. 225
Metals, chemicals and wood are man-employing industries and are not subject to seasonal influences. The large assortment of

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[63a] Although the clothing industry is seasonal, it is one of the most highly organized of the large women-employing industries, and hence comparatively well paid. See above pp. 45, 47, and Appendix, Table XII.

226 miscellaneous industries making small articles like hair goods, wooden novelties, sample cards, etc., all employ large numbers of women and all are subject not only to sharp seasonal movements but also to violent changes in fashion."[64]

227 A study of the fluctuations in the employment of men and women in New York State from 1928 to 1931 was made by the United States Women's Bureau from data compiled by the Bureau of Statistics and Information of the New York Department of Labor and published in the New York *Industrial Bulletin*. The conclusions reached in this study for the years 1928 to 1931
228 were substantially the same as those arrived at in the earlier study for the years 1923 to 1925:

"The manufacturing employment of women is shown to have been considerably more irregular than that of men. . . .

"The general employment level . . . was consistently (or at least in almost every
229 month) higher for men than for women in 12 of the industries or industrial groups considered, while it was consistently higher for women in only 5. It was irregular in the clothing group and certain of the food industries (candy and canning), being sometimes higher for one sex, sometimes for the
230 other. . . .

"Men's and women's employment may be compared from the viewpoint of whether or not the differences from high to low points

[64] New York State Department of Labor, Bureau of Statistics and Information, *Employment and Earnings of Men and Women in New York State Factories, 1923–1925*, Special Bulletin No. 143, 1926, pp. 9, 18, 19.

within each year varied greatly as between 231
the two sexes . . . women rather than
men were the sufferers of the greatest varia-
tion from high to low in any 1 year in a con-
siderable number of the industries in which
this relation of the two sexes was consistent
throughout the 4 years."[65]

[65] United States Department of Labor, Women's Bureau, *Employment Fluctuations and Unemployment of Women: Certain Indications from Various Sources, 1928–31*, Bulletin No. 113, 1933, pp. 73, 92–93. 232

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V. EMPLOYERS HAVE BEEN UNABLE TO REMEDY THE SITUATION THROUGH VOLUNTARY EFFORTS.

In two industries in New York State within recent years groups of employers have attempted to maintain minimum wage rates for women through voluntary agreement. The difficulties encountered by these employers in paying the wages agreed upon, in the face of competition from other firms which refused to join in the movement, and the final abandonment of their efforts, illustrate the futility of such attempts to set a bottom to wages in the absence of minimum wage legislation.

The attempt to establish a voluntary minimum wage for women in the laundry industry has been described in a report of the State Department of Labor as follows:

> "Recognizing that wages in a number of laundries were below the fair standard maintained by some firms in the industry, the New York State Laundryowners' Association in the fall of 1929 cooperated with the New York State Department of Labor in making a survey of women's wages in representative laundries, with a view to establishing a voluntary minimum wage for women by common agreement among its members. The outcome of the study . . . and of a conference between the Department of Labor and the Laundry Board of Trade, the organization authorized to carry on negotiations for laundry employers in New York City, was summarized in a letter written to the Industrial Commissioner by the President and Secretary of that organization:

'The members of our Board of Directors are unquestionably unanimous in their opinion that the minimum wage in the laundry industry for female workers in this city (New York) should not be less than $15 per week. It was decided that the Board of Directors would recommend to the membership as a whole a program which will, we hope, result in the adjusting of our wage scale to this point not later than October 1, 1930 and some of the members even felt it advisable to go so far as to recommend that the wage scale be further advanced by January 1, 1931 to not less than $16 per week.'

"The Board of Directors hoped that by the end of February 1930, every member of the Laundry Board of Trade would have pledged itself to carry out the recommendation.

"Although full agreement was not secured by the end of February 1930, the Industrial Commissioner and the Directors of the Laundry Board of Trade agreed that when the member laundries had consented, a public meeting, arranged for May 1930, should be held at which members of the Laundry Board of Trade would announce their decision to adopt a minimum wage. The meeting was later postponed until October 1930, when the Board thought that the laundries would be ready for united action, and many members would have put into effect the minimum

246 wage of $15 a week. Moreover, it was stated at the time that the Board of Directors felt bound by their recommendation.

"The public meeting did not take place in October—by the autumn of 1930 the depression had become an established fact. The Laundry Board of Trade admitted that,
247 owing to the economic situation, they would be unable to carry out their agreement but assured the Department of Labor that members of the Laundry Board of Trade would not reduce wages in their plants.

"In January 1931, when the plants studied in 1929 were visited, it was found that
248 women's wages had declined by six per cent and that the attempt to maintain wage levels had not been successful. . . .

"The Laundry Board of Trade stated that although the industry was anxious to have women's wages placed on a definite basis, the competition among power laundries and
249 the fact that hotel laundries were doing outside work at prices which no commercial laundry could meet, had made it impossible to establish a minimum at that time.

"The inability of the industry to adopt a voluntary minimum wage for women workers and later to maintain wage levels was due partly to the depression and partly to the
250 competitive situation in the industry. Laundry owners with lower wage standards were reluctant from the very beginning to raise wages to those being paid by competitors with fair wage standards. The recession in business activity intensified competition until

employers with fair wage standards also felt 251
unwilling or unable to pledge themselves to
maintain a voluntary minimum wage."[66]

After the application of the State Minimum Wage Law to the laundry industry, a directory wage order was in effect for nine months. Although the majority of laundryowners in the State observed the terms of the order and the 252
Department of Labor made every effort to bring the remainder into compliance, the maintenance of the wage standards was threatened by persistent violation on the part of a small minority of employers in the industry. The limitations of the directory wage order and the circumstances which led to the issuance of a mandatory order 253
are discussed later in Section VI.

Another attempt to maintain a minimum wage through voluntary agreement was made in the candy industry in New York State. For five years the Consumers' League of New York maintained a "Candy White List," in which it published the names of firms which agreed to adhere 254
to certain standards regarding wages and working conditions. The circumstances which led to the abandonment of the "White List" were described in a report of the Consumers' League as follows:

"The failure of voluntary efforts to fix a
bottom level for wages in industry is exem- 255
plified in the experience of the Consumers'
League with its Candy White List. After
five years of work in this industry based on

[66] New York State Department of Labor, *Report of the Industrial Commissioner to the Laundry Minimum Wage Board Relating to Wages and Other Conditions of Employment of Women and Minors in the Laundry Industry, New York State*, mimeographed report, 1933, pp. 11–13.

cooperation with members of the industry, backed by such public opinion as the League was able to rally, the White List was finally abandoned in 1932. It had become clear that legal coercion is necessary to bring the ever present recalcitrant minority into line if standards, which the better element in industry is willing to maintain, are to be protected.

"The 1923 study by the New York State Department of Labor of working conditions and wages for women candy workers revealed that half of the candy workers in New York City were earning less than $13.75 a week during even the comparatively busy month of March in a year when all business was prosperous and healthy. Forty-five per cent of those in the industry worked less than a full week even in a peak period at this time. A majority of the candy factories were then starting their workers at a weekly wage, usually of $12, while a few plants reported a beginning wage of $13 to $15 a week. But in such a highly seasonal industry all but the most skilled workers expected and received prolonged lay-offs during the season after Easter and just prior to Christmas. Therefore this beginners' wage was found to be practically the permanent wage for this large section of the candy workers which is laid off each season to begin anew the next.

"Because of these low wages the Consumers' League of New York four years later undertook a further study of the industry. Its report was first presented to the mem-

bers of the Consumers' League on March 17, 261
1928. Within ten days thereafter the New York Association of Manufacturers of Confectionery and Chocolate held a meeting and appointed a committee to confer with the officers of the League on the report and its findings. . . .

"The Confectioners Association, through 262
its committee, formally accepted the general health and sanitary standards proposed by the League but rejected the minimum wage provision. In cooperation with this committee, however, the League addressed a letter to two hundred candy manufacturers in New York City enclosing the list of standards 263
including the $14 minimum wage and asking if they wished to be included on the list of those who met the League's requirements.

"So wide a response was received requesting an immediate inspection and endorsement that the League at once employed four competent investigators who visited and reported on every factory to which they were invited. 264
On May 18th a White List of 57 firms was presented to the League membership and to the representatives of fifty social organizations. It was pointed out that each manufacturer on this list had met all requirements both as to wages and sanitary conditions and had promised to maintain these stand- 265
ards. Ten out of these fifty-seven, at the time of inspection, were found to comply with every requirement of the League. Forty-one raised the wages of beginners to $14 a week. The League felt that by insisting on this weekly wage of $14 for beginners it did no more than accept a standard set by

266 the most progressive manufacturers in the industry itself. The cooperation of responsible candy manufacturers alone made the White List possible.

"For more than four years this Candy White List was maintained and regular inspections made by the League's investigators. The idea of the Candy White List
267 spread to other states and at its peak included 101 leading firms in the four important industrial states—New York, Ohio, Pennsylvania, and Illinois.

"During the lifetime of the Candy White List the League widely advertised the list
268 and so far as was possible, by letter addressed to all known manufacturers and by advertisement, endeavored to extend the list to include all employers in the industry. Investigators for the League were indefatigable in their efforts to persuade employers by personal visits to join the move for better working conditions. At least twice
269 a year the cooperating plants were subjected to rigid inspection by the League's investigators. At such times suggestions for improving production methods were made in an effort to make it possible for these firms to raise their wages. Actually the League offered a trained service in scientific
270 management without cost as an inducement to higher wages.

"The candy firms who did join in maintaining the $14 minimum wage were enthusiastic and admitted the benefits accruing to them from better workmanship, and more interested and alert personnel, and expressed the belief that any additional labor cost was

amply repaid. But in the fall and winter of 271
1929 a number of firms began to complain of the lowered wage rates in other establishments. It became necessary to drop 11 firms from the White List because of their failure to maintain the wage agreed upon. A special plea to the consuming public was made at this time . . . 272

"Throughout 1930 and 1931 the League found the cooperating firms experiencing increasing difficulty in maintaining these minimum wage standards against the pressure of competition from those firms who refused to join in the movement to raise standards. 273

"The number of firms on the White List shrank steadily. Testimony by an officer of one of these cooperating firms given at the hearing on the New York State Minimum Wage bill in 1933 well describes the plight of employers at this time:

> 'The Hills Brothers Company accepted 274
> the minimum wage principle in 1929 and continued to support it under the White List of the 'Consumers' League until 1932. The officers and workers of the Hills Brothers Company believe in the principles set forth in the Wald Bill. During the three year period that a mini- 275
> mum wage was in effect in our Brooklyn plant, it cost us money. *The year that it cost the most was one in which the company was forced by cheap competition into a mad production scramble.* Under a minimum wage plan short seasonal increases in a labor force are expensive

because of the high training cost. This is a cost that shows. If stabilization of the work year is a good thing (and the Hills Brothers Company believes that it is) a minimum wage plan fits well into a stabilized production program.

'Of recent years many small producers have become our competitors. Their labor standards may be open to question. In a price market the production unit of our business is under constant fire. "X Company does this for 25c. Our costs are 30c. Why?" We believe, therefore, that a legal minimum wage that can be enforced on all employers will be a help to the employer who wants to maintain standards in his own industry, and of course a tremendous help to the workers involved.

'In the spiral of deflation in which we have found ourselves in the last four years, it is possible that a legal minimum wage may be a peg to arrest this deflation. . . .'

"In February 1933 the League regretfully terminated the Candy White List and sent a statement to the 85 cooperating firms remaining and to patrons, explaining that:

'. . . because of the widespread breakdown of labor standards which has affected the candy industry as well as many other industries, we find ourselves forced to discontinue the issuance of the White List of candy manufacturers.

'One of the most important standards set up by the White List was a minimum

wage of $14 for a full week's work. 281
Although through the splendid cooperation of many candy manufacturers it was possible for approximately five years to maintain this wage standard, our project must now be abandoned because of the fact that candy manufacturers included in our White List have 282
been compelled through the ruthless force of competition to reduce wages below this minimum standard.

'. . . In spite of the fact that we stood ready to reduce the minimum wage standard by 10 per cent, we were informed by practically all White List 283
candy manufacturers that they could not give any reasonable assurance that they would be able to meet even this reduced wage standard. We were, therefore, compelled to recognize the fact that despite the remarkable cooperation given by the leaders in the candy indus- 284
try a voluntary agreement such as we had established could not meet a situation such as the one which confronts us today, and that we must now place our reliance for the maintenance of certain minimum labor standards on the enactment of legislation which makes the terms of competition equal for 285
everybody.' "[67]

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[67] Consumers' League of New York, *Voluntary Minimum Wage Standards in the Candy Industry*, by Elinore Morehouse Herrick, former Executive Secretary, unpublished report, 1935. See also Elinore M. Herrick, "Why Organized Consumers Want Minimum Wage Legislation", *World Convention Dates*, March, 1933, pp. 10–11, 46; also, National Consumers' League, statement on Candy White List issued February, 1933; and *Candy White List*, published annually by the Consumers' League of New York, 1928–1932.

VI. THE APPLICATION OF THE MINIMUM WAGE LAW TO THE LAUNDRY INDUSTRY HAS ESTABLISHED A WAGE UNDER WHICH THE INDUSTRY CAN OPERATE.

1. Conditions prevailing in the industry prior to the wage order.

The laundry industry had long been recognized as a low wage industry and one in which there was little standardization of the wage rates paid to women employees. A survey of women's wages, made in 1926 by the Bureau of Women in Industry of the New York State Department of Labor, showed that both wage rates and weekly earnings of the women varied widely, ranging from more than $35 a week in some laundries to less than $5 in others.[68] Although average weekly earnings of women were $14.67, one-fifth of the women in the industry were earning less than $12 a week. With the increase in business prosperity, women's wages had risen somewhat by 1929,[69] but even at that time, during the peak of prosperity, the undercutting of wage rates by certain employers in the industry was sufficiently widespread to cause concern. The attempt by agreement between the State Department of Labor and the Laundry Board of Trade of New York City to establish a voluntary minimum wage of $15 a week for women, and the failure of these efforts,

[68] New York State Department of Labor, Bureau of Women in Industry, *Hours and Earnings of Women Employed in Power Laundries in New York State*, Special Bulletin No. 153, 1927.

[69] New York State Department of Labor, *Report of the Industrial Commissioner to the Laundry Minimum Wage Board Relating to Wages and Other Conditions of Employment of Women and Minors in the Laundry Industry, New York State*, mimeographed report, 1933, pp. 2–3.

have already been described in the preceding section. A survey conducted soon after, in 1931, indicated that wages had dropped even below the 1926 level.[70] 291

By 1933 the continued price cutting, made possible by the payment of unreasonably low wages, had resulted in such a chaotic condition in the laundry industry that laundryowners' associations urged the enactment of a state minimum wage law. The New York State Laundryowners' Association and affiliated local organizations supported the Wald Bill and, upon its enactment and approval by Governor Lehman in April 1933, urged the State Department of Labor to begin its application to the laundry industry at once. In the meantime the Department of Labor was receiving letters from women employees in the industry stating that their wages of $6, $7 and $8 for a full week's work were inadequate to provide them with the necessities of life and urging that action be taken to ensure them a fair return for their labor.[71] 292 293 294

The size of the laundry industry in New York State and the number of women who are dependent upon it for a livelihood, made the question of women's wages in this industry one of vital public concern. At present it employs over 20,000 women in New York State, and the occupation of laundry operative ranks eighth among the leading occupations of women wage earners 295

[70] *Ibid.*

[71] Copies of resolutions and letters from employers and workers in the industry will be found in the *Report of the Industrial Commissioner to the Laundry Minimum Wage Board, op. cit.*, pp. 8–10, 14–19.

296 in the State. Among manufacturing, mechanical and allied industries, laundries ranked third in the number of women employed in 1930.[72]

Because of the importance of the industry, the existing wage situation, and the widespread demand for remedial measures, the Department of Labor began the application of the Minimum
297 Fair Wage Act to the laundry industry within a month after the law became effective.

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[72] *Report of the Industrial Commissioner to the Laundry Minimum Wage Board, op. cit.*, pp. 21–28.

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2. Findings of the preliminary investigation in the laundry industry. 301

As the first step in bringing the laundry industry under the Minimum Fair Wage Law, the Department of Labor made an investigation of the wages being paid to women and minors in laundries throughout the State, as provided in Section 554 of the law. The purpose of the in- 302
vestigation was to ascertain whether an appreciable number of women and minors were receiving oppressive and unfair wages and, should such be the case, to provide data on prevailing wages and conditions in the industry for the consideration of a laundry wage board. Laundries of varying size and type in 32 cities and towns were visited by 303
trained investigators of the Division of Women in Industry and Minimum Wage, who interviewed employers and transcribed payrolls for the week including May 8, 1933. A record of annual earnings was also obtained for a number of workers.

The analysis of the records revealed great variation in wage rates being paid to women and 304
minors for similar work. The findings were summarized as follows:

> "The wages of women employed in laundries in New York State have been greatly reduced during the past few years. . . . During the past year, wage cuts in a number of plants have resulted in a reduction of 21 305
> per cent in the median rate of pay; in some plants there have been three and four wage cuts during this period. Further investigation of annual earnings of women laundry workers from May 1932 to May 1933 shows that the median earnings for the year were

306 $593 and that, of the women who had worked all 52 weeks, half had earned less than $634 and six had earned between $300 and $400.

"Because of the intense competition in the industry and the successive lowering of wages and prices, there exists at the present time a complete lack of standardization of
307 wages of women laundry workers. Earnings of women employed in the laundries investigated in May 1933 ranged from under $3 to $32 a week. This variation cannot be accounted for on the basis of differences in the type of work performed, since the week's earnings of flat work operators ranged from under $3 to $17; of hand ironers, under $3
308 to $28; of press operators from under $3 to $29. A comparison of the plant averages, that is, the average earnings of all the women in the plant for the given week, similarly shows the striking lack of standardization between plants. Average week's earnings of the women ranged from $3.67 in one plant
309 to $15.12 in another. Marked differences between plants were found in practically every locality in which a number of plants were studied.

"There are many laundries in which wage rates have been maintained while actual earnings have decreased because of loss of
310 business and part time work. Nevertheless, the variations in amounts earned by women doing similar work in different plants cannot be accounted for wholly by differences in hours worked. The earnings of women who worked a full week in May 1933 (that

is, 48 hours or more) ranged from $5 to over 311
$25. The annual earnings of women who worked the entire 52 weeks from May 1932 to May 1933 ranged from under $300 to $1600.

"Lack of standardization in wages, regardless of the hours worked, is also revealed by a comparison of the rates of pay, 312
which represent the maximum a woman can expect to earn by working a full week. The weekly rate for flat work operators was under $6 in some plants, $18 in others; for press operators it ranged from under $6 to $20. Similarly, hourly rates for flat work operators ranged from 13 cents to 50 cents.

"These figures bear evidence of the exist- 313
ence of a situation which is recognized by many familiar with the industry, that wages have been successively lowered by unscrupulous employers who resort to wage reductions as a means of undercutting their competitors, and that in the face of such competition the better type of employers are 314
gradually forced to lower wages and prices, with the result that the entire structure of the industry is threatened. It is also self-evident that the individual woman worker is even more helpless than the individual employer in this situation. Since her work is relatively unskilled and few women 315
throughout the State are organized, she has no bargaining power and consequently no alternative but to accept whatever wages are offered. Dissatisfaction with the present wage situation and a demand for remedial

316 measures have been expressed both by workers and by employers in the industry.'"[73]

After a study of the detailed findings of the investigation, the Industrial Commissioner concluded that the situation warranted the summoning of a wage board to recommend minimum fair wage standards for women and minors employed
317 in laundry occupations. He therefore appointed the laundry wage board, composed of three representatives of the employers in the industry, three representatives of the employees, and three impartial members representing the public.[74] In submitting his report to the wage board, the Industrial Commissioner stated:

318 "The investigation has brought to light further evidence of the 'employment of women and minors at wages unreasonably low and not fairly commensurate with the value of the services rendered'. The facts, especially those relating to the amount of employment available over a period of time and to the
319 great variation in wages paid by different employers for the same kind of work, appear to indicate that 'by reason of their necessitous circumstances' women are 'forced to accept whatever wages are offered them'. These same findings make it appear that in fact 'wages are in many cases fixed by chance and
320 caprice and the wages accepted . . . bear no relation to the fair value of the service rendered'.

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[73] *Report of the Industrial Commissioner to the Laundry Minimum Wage Board, op. cit.*, pp. 67–69.

[74] For a list of the members and their affiliations, see Appendix, Table XVII.

"It appears further that the constant low- 321
ering of wages which has been found to be taking place for some time past does 'constitute a serious form of unfair competition against other employers', does 'reduce the purchasing power of the workers', and does 'threaten the stability of industry'. For all these reasons I am earnestly convinced that 322
the findings of this investigation, together with other relevant information in the hands of this Department, reveal just such a situation as that declared in the Minimum Wage Act 'to render imperative the exercise of the police power of the State for the protection of industry and of the women and minors em- 323
ployed therein and of the public interest of the community at large in their health and well-being and in the prevention of the deterioration of the race.' "[75]

[75] *Report of the Industrial Commissioner to the Laundry Minimum Wage Board, op. cit.*, Letter of Transmittal.

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3. Basis for recommendations of the Laundry Minimum Wage Board.

After three weeks of deliberation, "on the basis of a full discussion of the comprehensive and detailed picture of the laundry industry in reports compiled by the Minimum Wage Division of the State Department of Labor and by the Consumers' League of New York," and after giving "careful consideration to the many important phases of the problem disclosed not only in the reports submitted to it but in the free discussion of the Board," the laundry wage board on August 11th submitted its recommendations, unanimously adopted, to the Industrial Commissioner.[76] The minimum rates proposed for women and minors employed in laundry occupations were considerably lower than those originally proposed by the labor representatives on the board as providing a "living wage" ($16 per week). After consideration of prevailing conditions in the industry the board agreed, however, that such a wage standard, although desirable from the point of view of the workers, could not then be maintained by the majority of the employers in the industry.

> "The difficulties faced by the laundry industry were fully discussed. They reveal a highly competitive condition—in which competition is found not only between plants, but also between plants and their own customers. Prices have been so drastically lowered in an effort to retain business that this fact has further complicated an already excessively depressed

[76] New York State Laundry Minimum Wage Board, *Report of the Laundry Minimum Wage Board to the Industrial Commissioner of New York State*, mimeographed report, 1933.

condition due to the wage slashes of recent 331
years. In the past few months the drop in
volume of laundry business has added still
further difficulties.'"[77]

The objective of the board was to fix a bottom to the wage level at a point which would assure as fair a return as possible to the lowest paid workers in the industry and at the same time be enforceable 332
throughout the industry. In making its recommendations the board stated:

". . . While the rates herein proposed are less than the general movement for wage increases might encourage any one to anticipate, they do involve a direct and substantial increase, averaging over 20 per cent, in the 333
earnings of more than two-thirds of the women and minors now employed. . . .

"The Wage Board is a unit in its earnest desire to improve conditions for the workers. In seeking to assure this objective it has had to recognize that lack of stabilization of labor costs is ruinous to the industry and peculiarly 334
so to the individual employer who wishes to maintain conditions that give a fair return to all.

"All members of the Board desire to fix a bottom level below which no employer may cut his wages, and give full recognition to the fact that unbridled competition has driven 335
the rates in some establishments so low that wages fall far short of giving a fair return to the workers. Nevertheless, all concur in the belief that the welfare of the industry and

[77] *Ibid.*, pp. 1–2.

the decent maintenance of its workers will best be served by fixing the minimum at as high a figure as under present conditions can be effectively maintained. The law itself makes provision whereby after one year conditions in the industry may be reviewed, in order to adjust any inequalities which may by that time be revealed."[78]

The minimum rates recommended by the wage board were 31 cents an hour for the New York City area and 27½ cents an hour for the remainder of the State, or $12.40 and $11 per week, respectively, on the basis of a 40 hour week. The board also recommended "an increase in the rate of earnings of those who work only a part of any week, and additional recompense to those who work more than a full week of 40 hours for the extra fatigue encountered", the higher undertime rate to apply to a working week of less than 40 hours, and the overtime rate to apply to working hours beyond the forty-fifth. (Later investigation made by the Department of Labor after the directory wage order had become effective showed that the average working week of women employed in laundries throughout the State was 40 hours. For further discussion of this investigation, see page 74.)

After public hearings the Industrial Commissioner approved the report of the wage board and issued Directory Order No. 1 Governing Women and Minors in Laundry Occupations, effective October 2, 1933.

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[78] *Ibid.*

4. The effect of the wage order on the wages of women and minors employed in laundries in New York State. 341

At the end of the directory period, the Division of Women in Industry and Minimum Wage of the State Department of Labor pointed out that the directory order had been effective in raising the wages of women and minors in laundries throughout the State and had brought about substantial 342 wage increases for individual women, that there had been no discernible tendency for the minimum wage to become the maximum or for wages of the higher paid employees to be reduced.[79] A statewide survey of laundry payrolls had revealed that the average weekly earnings of women and minors in laundries had increased from 343 $10.41 in May 1933, before the wage order was issued, to $12.12 in November 1933, after the directory order had been in effect for one month. It was pointed out that this increase in week's earnings was even more significant when considered in relation to the hours worked, since the higher earnings in November represented wages 344 for a considerably shorter working week than that in May (an average week of 40 hours in November, and 45 in May).

In an attempt to discover whether the wage rates of women who had been receiving more than the minimum were reduced after the wage order became effective in order to compensate for 345 increased earnings among the lower paid groups, a more detailed study was made of the effect of the

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[79] New York State Department of Labor, Division of Women in Industry and Minimum Wage, *Report to the Industrial Commissioner, The Effect of Directory Order No. 1 on the Wages of Women and Minors in Laundries in New York State and the Need for a Mandatory Wage Order Governing Laundry Occupations*, mimeographed report, 1934.

order on the earnings of 952 women for whom wage data were available both before and after the order was issued. It was found that 81 per cent of these women had higher hourly earnings in November than in May; 13 per cent were earning the same amounts; and only 5 per cent were earning less. The increases ranged as high as 22 cents per hour. In May only 89 of the 952 women had received wages which were higher than the minimum rates later established under the wage order, but of these 89 women, only five had had their rates reduced to the established minimum in November; 52 had *higher* hourly earnings in November than in May. Further indication that the minimum wage did not become the maximum was the fact that in November, after the directory wage order had been in effect for a month, almost a third (31 per cent) of the women and minors employed in laundries throughout the State and 38 per cent of those outside the New York City area were receiving more than the minimum wage required for the hours worked.

The mandatory wage order has been even more effective both in raising the general wage level of women and minors employed in laundries and in preventing the payment of substandard wages. An analysis of the payrolls of laundries throughout the State[80] in November 1934, three months

[80] Continuous information regarding wages paid to women and minors in laundries is obtained by the minimum wage inspectors of the Department of Labor, who visit the laundries to check payrolls. In order, however, to secure a picture of wages throughout the industry at any one time, it is necessary to analyze payroll reports from all laundries for a given week. The first report of this type was obtained a month after the directory order became effective, in November 1933, when every laundry in the State was requested to send to the Division of Minimum Wage a sworn copy of its payroll for the first week in November. This payroll analysis was repeated in November 1934 and November 1935.

after the mandatory wage order became effective, showed that the average weekly earnings of women and minors in the industry had increased to $13.17. By the next year, November 1935, they had further increased to $13.42.

Week's Earnings in New York State Laundries[1]

Week's Earnings	No wage order, May 1933	Directory order, November 1933	Mandatory Order	
			November 1934	November 1935
Number of laundries	178	[2] 2,210	[2] 2,120	[2] 2,047
Number of women and minors	5,322	22,325	21,421	21,959
Median earnings	$10.41	$12.12	$13.17	$13.42
Per cent of those earning:				
Less than $8	21.9	12.1	7.4	6.6
Less than $12	69.0	48.4	28.4	24.6
Less than $15	90.9	86.7	83.4	78.3

[1] Compiled from New York State Department of Labor, Division of Women in Industry and Minimum Wage, *Report to the Industrial Commissioner, The Effect of Directory Order No. 1 on the Wages of Women and Minors in Laundries in New York State and the Need for a Mandatory Wage Order Governing Laundry Occupations*, mimeographed report, 1934, p. 9; and *Wages and Hours of Women and Minors in New York State Laundries, November*, 1934, *and November*, 1935, unpublished reports, 1934, 1935.

[2] These figures represent the number of laundries whose payroll reports were received within the time limit set for tabulation, not necessarily the total number of laundries in the State covered by the wage order.

The period from 1933 to 1935 was one of increasing wages throughout industry. However, the wage increases for women in the laundry industry were far greater than those for women in industry as a whole in New York State. As shown above, the average weekly earnings of women in laundries increased from $10.41 in May 1933, before the wage order was issued, to $13.42

356 in November 1935, an increase of 29 per cent. The average weekly earnings of women in all New York State manufacturing industries combined increased from $13.35 in 1933 to $15.58 in 1935, or 17 per cent.[81]

By November 1935, only 6 per cent of the laundries in the State were paying any of their
357 women and minor employees less than the minimum rates established for the hours worked, as compared with 27 per cent under the directory order. The proportion of women and minors receiving wages below the prescribed minimum had decreased from 38 per cent under the directory order to 1.3 per cent under the mandatory order.[82]

358

	Under directory order (November 1933)	*Under mandatory order (November 1934)*	*(November 1935)*
Per cent of laundries paying less than the minimum rates:			
New York State..	26.9	7.4	6.0
New York City Area	27.4	6.1	5.9
Outside New York City Area	24.0	13.7	6.2
Per cent of women and minors receiving less than the minimum rates:			
New York State..	37.7	2.2	1.3
New York City Area	46.1	2.2	1.4
Outside New York City Area	7.1	2.2	1.0

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[81] See Appendix, Table XII. In that table the figures representing average weekly earnings for 1935 were based on the first eight months of the year, as indicated in the footnote, since complete figures for the year 1935 were not available at the time the table was compiled. The figure given above ($15.58) represents the average weekly earnings of women factory workers in New York State for the entire 12 months of 1935.

[82] See Appendix, Tables XVIII, XIX.

A large majority of the employers paying less 361
than the established minimum rates in November 1934 and of those subsequently found by inspectors of the Division of Minimum Wage to be underpaying their workers, later came into compliance with the terms of the wage order by paying their employees the amounts legally due from the date the mandatory order became effective. 362 The Department of Labor collected and turned over to employees such sums, to the amount of more than $18,000, during the first year after the mandatory wage order was issued. The total amount collected up to March 3, 1936 was $34,000.

The payroll records of laundry employers 363
throughout the State offer striking testimony to the fact that the minimum rates established by the wage order are reasonable and well within the ability of the industry to pay. The records for November 1935 showed that 94 per cent of the laundry owners were complying with the terms of the mandatory order. Not alone that, but 58 per cent were paying more than half their 364
women and minor employees wages higher than the established minimum rates. Forty-two per cent of the women and minors employed in the laundry industry of the State were being paid wages above the minimum prescribed, an indication, also, that the minimum has not tended to become the maximum wage.[83] 365

[83] See Appendix, Tables XVIII, XIX.

366

	Under directory order (*November 1933*)	*Under mandatory order* (*November 1934*)	(*November 1935*)
Per cent of laundries paying:			
At least the minimum rates to all their employees.	73.1	92.6	94.0
367 More than the minimum rates to more than half their employees	46.2	56.1	58.2
Per cent of women and minors receiving:			
At least the minimum rates.....	62.3	97.8	98.7
368 More than the minimum rates.	31.2	39.0	42.1

It is sometimes assumed that compliance with the minimum wage law places the heaviest burden upon small establishments; that the larger firms are the ones which can most readily pay
369 the rates ordered. This assumption is not borne out by an analysis of the compliance records according to size of laundry. On the contrary, such an analysis shows that, in general, failure to pay the minimum rates prescribed has varied directly with the size of the establishments. Only 8 per cent of the laundries with 10 to 24 employees were paying less than the minimum rates in
370 November 1935, as compared with 13 per cent of those employing 100 to 200 workers and 23 per cent of those employing 200 or more. Furthermore, 35 per cent of the laundries with 10 to 24 employees were paying wages above the minimum to more than half their women and minor

employees, as compared with 13 per cent of those with 100 to 200 workers. The fact that the smallest laundries, those with less than 10 employees, showed a still greater extent of compliance, is probably related to the fact that this group includes the majority of hand laundries, where women are employed in the more skilled jobs as hand ironers.

Compliance with the Mandatory Wage Order by Size of Laundry, New York State, November 1935 [1]

Size of Laundry	Per Cent of Laundries Paying —	
	Less than the minimum rates	More than the minimum rates to more than half their women and minor employees
Total	6.0	58.2
Less than 10 employees	3.9	70.6
10 to 24 employees	7.9	35.0
25 to 49 employees	11.8	23.1
50 to 99 employees	13.3	16.7
100 to 199 employees	13.2	13.2
200 employees and over	22.7	45.4

[1] Based on Appendix Table XX.

There is no indication that the increased wage for women has resulted in the displacement of women by men in the laundry industry.[84] Throughout the period from 1933 to 1935 women have continued to form 60 per cent of the employees in New York State laundries.

[84] See Appendix, Table XXI.

VII. THE EXPERIENCE AND PRINCIPLES IN THE FIXING OF GROUP WAGES ON THE BASIS OF VALUE OF SERVICES.

1. The development of principles of group wage determination according to value of services.

The New York State Minimum Fair Wage Act contains, in Section 551, subdivision 8, a definition of "a fair wage" and specifies the principle to be used in arriving at the wage. By including this concept of a fair wage as applicable to group wage determinations, the legislature has given recognition to a usage increasingly accepted both in industry and at law. The practice of fixing group wages which are accepted as commensurate with the value of the services rendered, through testing the proposed rates by means of principles susceptible of objective checks, has become increasingly important during the past thirty or thirty-five years.

Even earlier, group wage determinations established as the result of trade union negotiations to some extent embodied such principles. Unquestionably there were at times other considerations operative in fixing the level of union rates. Also, where the record makes it obvious that the wage determination was based on definite principles accepted by both sides, a variety of principles has been used. Sometimes these determinations have been in conformity with the concept of a wage commensurate with the value of the services rendered, in other cases there has been a partial application of that idea. In still others, there has been no necessary relationship to the value of services, as in the case of a wage based on cost of living or on the ability of the industry to pay a

given wage. What is indisputable is that industry 381
itself and its commentators have long since developed techniques, more or less satisfactory in application, whereby group wage determinations can be made by means of the application to a specific situation of principles of wage setting.

We are here concerned with the application of a single principle or set of principles as a basis 382
of determining group wages, namely, that the remuneration for the service or class of services can be made commensurate with their value—i.e., a group application of the old concept of *quantum meruit*. The embodiment of this principle in the practice of group wage determinations is drawn from a variety of sources. Trade union negotia- 383
tions, as the citations amply demonstrate, employed this principle frequently and with increasing clarity. Adherents of the scientific management movement, when they arrived at positions of authority in industry, made conscious and elaborate use of formulae built on this same basic assumption that the wage for whole classes of 384
service could be so fixed as to represent a "fair return." Finally, general social concern with an industrial situation which was regarded as returning to many groups of workers less than the value of their services took the form of legal provision of machinery for arbitration and mediation. This machinery had as one specific purpose the establishing of group wages at rates commensurate 385
with the fair value of services rendered.

An examination of actual awards, of scientific management studies, of the findings of arbitration boards and of other publications dealing with the subject shows that a great many factors have been

considered as affecting the fair return for group services. Since their application has been made in a field where other factors (such as the relative bargaining power of the two sides to the wage bargain, or marked changes in the cost of living or in the labor supply) could not be disregarded, it has frequently happened that the principles in determining fair value of services were not clearly distinguished or fully applied. However, a compilation of statements of actual practices show that at least the following factors have at different times been considered in arriving at a rate commensurate with group value of services rendered.

1. Wages paid for similar work in other establishments.

2. Wages paid for similar or related work in other industries in the locality or the market area.

3. Wages paid for similar or related work in other localities or market areas.

4. Hazards of the employment.

5. Training and skill required.

6. Degree of responsibility.

7. The physical effort or laboriousness involved in the job.

8. Monotony of the work.

9. The character and regularity of the employment.

10. The relation to wages in other occupations in that industry.

11. The relation of wages to production costs and plant efficiency.

This list of principles is by no means exhaustive. 391
The number of factors considered and the weight given to them has depended upon the circumstances in the case under consideration. The material examined on the subject indicates that some or all of these principles were used in the final determination of a fair wage by the agencies charged with this responsibility. 392

These rates, when established, have been known under various names, such as the "average efficiency" rate for workers in an occupation, the "minimum standard" rates for workers of ordinary skill and training, or the rate for "a normal amount of effective work." Provision is often made for workers who are less skilled because of 393
age, physical or other handicaps. Provision as needed is made for learners or apprentices in skilled operations for whom training is necessary in order to bring them up to the standard.

The material presented is in two parts. The first consists of quotations intended merely to illustrate the variety of agencies which have 394
applied principles of fair value of services for the determination of the wages of groups of employees, and to show typical statements of how the determination was arrived at in the particular case. It has been roughly classified as follows:

A. Scientific management.
B. Trade union agreements. 395
C. Employee representation plans.
D. Government boards and commissions.
E. Mediation and arbitration awards 1924–1934.

The second part (F) consists of excerpts from a book published by Professor Herbert D. Feis

396 and entitled: *A Collection of Discussions Presenting Principles of Wage Settlement.* It comprises the author's analysis of principles by which wage settlements have been arrived at and a group of cases illustrating. It covers the period 1900–1923.

2. Evidence illustrative of the principles of group
397 **wage determination according to value of services.**

A. SCIENTIFIC MANAGEMENT [85]

(1) *"Wage scales and job evaluation"*—1926 [86]
(Sperry Gyroscope Company)

"This book has been written to be practically useful. It does not deal with theories of wages or the economics of compensation. In contrast, it presents results of extensive, actual experience in developing an equitable
398 wage program for a manufacturing concern. The methods described have been applied with success and possess desirable features, which seemingly are of general application. . . .

"Interest in the subject of wages is always maintained. For the worker wages mean livelihood and an opportunity to share in comforts and luxuries. For the employer, wages represent usually a large part of the cost of carrying on business. . . .

399 "More and more, however, the point of view is being accepted that wages and salaries should be based upon the principle of 'service rendered.' This fundamental should not only control relationships within an occupation; but also the relative relationships between different lines of work. . . ." [87]

"In spite of the difference in emphasis that may be placed upon the same point by an employe and his employer, there is generally a common agreement upon the factors which may rightfully be considered as hav-
400 ing a bearing upon the situation. An agreement in the

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[85] Some of the companies referred to also had trade union agreements or employee representation plans.

[86] Lott, Merrill R., Director of Research and Statistics, Continental Baking Corporation; formerly Personnel Superintendent, Sperry Gyroscope Company, *Wage Scales and Job Evaluation—Scientific Determination of Wage Rates on the Basis of Services Rendered,* New York, 1926.

[87] *Ibid.,* pp. v-vi.

relative influence which these various items should have upon the pay and the job can be reached if all important items are presented for calm and deliberate consideration to a group of individuals competent to express opinions on the questions involved. . . .[88]

"Factors Bearing on Relationship Between Occupations. . . .

"The following fifteen factors composed one list made up for the metal industries. Many of them are common to other lines of work. . . .

1. Length of Time Required to Learn a Trade. . . .
2. Time Required to Adapt Skill. . . .
3. Scarcity of Labor Supply. . . .
4. Difficulty of Locating Elsewhere. . . .
5. Educational Requirements. . . .
6. Prevailing Rate. . . .
7. Degree of Accuracy and Skill. . . .
8. Ingenuity. . . .
9. Possible Loss to Company Through Unintentional Errors. . . .
10. Dependence That Must Be Placed Upon the Integrity and Honesty of Effort of an Employee. . . .
11. Dirtiness of Working Conditions. . . .
12. Exposure to Health Hazard. . . .
13. Exposure to Accident Hazard. . . .
14. Physical Effort Required. . . .
15. Monotony of Work. . . .[89]

"The foundation is laid for a scientific adjustment of wage scales when once the work requirements are definitely known and the factors influencing the worth of occupations to an industry are recognized.

"Four steps are involved in the preparation of such a schedule after these preliminaries have been gone through with, namely:

1. Distinguishing between the importance of the various factors named.

2. Determining the extent to which each factor enters into the various lines of work for which the wage rates are to be established.

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[88] *Ibid.*, p. 46.
[89] *Ibid.*, pp. 47–59.

406

3. Computing an index figure whose numerical value will express the relationship that should exist between wage rates.

4. Interpreting the index figure into actual wage rates.

"A thoughtful inspection of the fifteen factors listed in the preceding chapter will show that all of these items are not of equal importance. A careful analysis will establish the degree of difference. . . .[90]

407 "Experience with the rating plan described . . . . has fully justified its existence as a standard practice for shops paying their workers on a time basis. . . ."[91]

(2) *National Metal Trades Association—"Methods of Wage Payment"—1928*

"In 1928 the National Metal Trades Association made a survey of the systems of wage payment used in 408 the 672 plants in their association. They found that 307, or 45.7 per cent of the plants paid all employees on a straight time basis, while 365 or 54.3 per cent paid some or all employees on an incentive basis. . . .[92]

"The following report was made after a study of the plans of wage payment used by the 672 plants covered in the survey. The committee stated in presenting the recommendations that 'it would seem that the following eight broad rules and principles should be observed in the adoption and administration of an incentive plan:

409

1. The work in question should be studied in detail and definite methods of operation adopted . . . the best way to do the job . . . determined.

2. Rates or standards should be established only as a result of a series of accurate studies . . . [so] as to make unnecessary any later change in the rate or standard as long as the job itself remains unchanged.

410

3. A definite task, bogey, or other measure of what constitutes a day's or a week's work should be established. . . .

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[90] *Ibid.*, p. 60.

[91] *Ibid.*, p. 105.

[92] Barnes, Ralph M., *Industrial Engineering and Management, Problems and Policies*, New York, 1931, p. 183; see also, National Metal Trades Association, Committee on Industrial Relations, *Methods of Wage Payment*, 1928, 57 pp.

4. Employees should be protected against the possibility of reduced earning power due to circumstances beyond their control. . . . 411

5. The wage incentive used should be sufficiently flexible to permit application to the maximum number of jobs and the maximum number of employees.

6. The wage payment plan for indirect labor and supervision should be such as to harmonize with the incentive plan used for direct labor, so that there will be no conflicting interests between the different groups of employees. . . . 412

7. Whatever plan of wage payment be used, it is most important that the plan itself be simple enough to be readily understood by all employees. . . .

8. Under all circumstances and under all conditions the plan or plans of wage payment should not only be fair and just to employee and management alike but should scrupulously avoid any appearance or even suggestion of unfairness in any sense whatsoever. 413

"'Your committee therefore:

1. Urges members to use an incentive plan of wage payment whenever and wherever possible.

2. Recommends that the foregoing eight rules and principles be closely adhered to.

3. Points out the superiority of the simple types of incentive plans, such as ordinary piece work with guaranteed day rate, over the more complex systems. 414

4. Emphasizes the fact that a spirit of mutual confidence and faith based on square dealing between employees and management is essential to maximum satisfaction from all standpoints.'"[93]

"The employe's pay envelope is the very heart of all industrial relations, and to a large degree the success and prosperity of American industry is the result of adequate and just wages. . . ."[94] 415

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[93] Barnes, *Industrial Engineering and Management, op. cit.*, pp. 207-208.

[94] National Metal Trades Association, *Methods of Wage Payment, op. cit.*, Foreword.

(3) *"Wage-payment plans that reduced production costs"*—1930 [95]

The writer introduced a wage incentive system in 1905 at the Atlas Engine Works at Indianapolis. After extensive study of wage payment plans in various industries he concluded that "a fair exchange is the basis, not only of business success but of wage-incentive systems." [96] He analyzed the "Factors Governing Base Rates" in about 20 plants and recommended the following procedure for the introduction of wage-incentive systems:

"After having classified and sub-classified our trades and occupations, we are ready to investigate the factors that will effect the minimum and maximum wages properly applying to each of them in any particular locality and business.

"We will need to secure information on the following factors as they exist in the community:

a. Prevailing rates in the occupations and subdivisions of each occupation.

b. Trade union scales.

c. Labor supply available.

d. Mental and physical requirements for each subdivision of each occupation, whether low, ordinary, or high.

e. Experience and skill required in the particular business as compared with other businesses in the community.

f. Standards of living of the social group represented in each occupation.

g. Minimum wage laws.

h. Production costs and profits, these in turn depending upon the efficiency of management as it affects each occupation." [97]

Some of the companies included in this study were:

Holeproof Hosiery Company.
Van Dorn Iron Works, Cleveland
Edison Electric Appliance Company, Inc.—3 plants
Abbott Laboratories, North Chicago, Ill.
Newport News Shipbuilding and Dry Dock Company

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[95] Diemer, Col. Hugo, *Wage Payment Plans that Reduced Production Costs*, New York, 1930.

[96] *Ibid.*, p. 14.

[97] *Ibid.*, p. 16.

Middletown Car Company
Wilson and Company, Chicago
Western Electric Company—2 plants
National Cash Register Company—Dayton, Ohio. 421

(4) *"Executive guidance of industrial relations—an analysis of the experience of twenty-five companies"—1935* [98]

This study of methods of wage payment was part of a study of personnel management in 25 selected companies. "In choosing our sample . . .," the author states, "we have not used objective tests, but have selected twenty-five American firms that are well known for their industrial relations . . . Some attention [was] paid to the distribution of the firms by locality, industry, and size. With respect to the last of these, the sample is definitely biased, for two-thirds of the chosen companies are among the two hundred largest corporations in the United States." [99] 422

With reference to "Standardization of Base Rates and Salaries," the study showed that: 423

> "Most of the selected companies use financial incentives of either the group or individual type on all operations for which output standards can be set with reasonable precision and uniformity. That is, they employ incentives where work can be time-studied satisfactorily. The subject of financial incentives is so broad and their adoption so universal as to make an adequate discussion of them here inadvisable. But there is one phase of compensation that seems to warrant inclusion, namely, the systematic rating of jobs and occupations so that basic salaries and hourly rates may be in close harmony with the difficulty and responsibility entailed. 424
>
> "Of the two dozen selected companies, ten (40 per cent), have 'standardized' their basic salaries and wage rates. Of these, four use the short-cut 425

[98] Balderston, C. Canby, *Executive Guidance of Industrial Relations—An Analysis of the Experience of Twenty-five Companies*, Philadelphia, 1935. Industrial Research Department, Wharton School of Finance and Commerce, University of Pennsylvania. Philadelphia, Research Studies XXV.

[99] *Ibid.*, pp. 3–4.

426 method of comparing the amounts actually paid in order to 'iron out' obvious discrepancies. This process is virtually one of cross-comparison after arranging the individual salaries in each department according to amount. The other six firms prefer to secure a rating of their jobs or occupations according to difficulty and responsibility prior to pricing them. This process involves several steps; the definition of what the title of each job or occu-
427 pation means; the creation of a rating sheet (which becomes the measuring instrument); the choice of capable raters, the translation of their combined appraisal into points, and finally the pricing of the jobs or occupations with reference both to these ratings and to the 'market.' Throughout this process, the analysis is focused upon jobs or occupations rather than upon employees." [100]

The following is a statement of the methods of wage
428 standardization used by four of the companies studied.

American Rolling Mill Company, Middletown, Ohio

"It is said to be Armco's wage policy to pay for every class of service a standard compensation as high as is current in competitive industries. The method of grading the occupations to maintain uniformity among the several plants is sufficiently unusual to merit a detailed explanation. One of
429 its unique characteristics is the effort to make rates of similar jobs in different parts of the country uniform. Much of the following description of the job rating is taken from the company announcement at the time the plan was announced.

"In order to provide for a fair relationship among the wages paid on jobs in the several plants of the company, a two years' study was made of the effects of the existing wage and incentive
430 arrangements upon employee earnings in the various plants. The results, announced late in 1931, represent a careful analytical approach to the problem. Previous to this date, the company had treated its rate-setting problem in the usual way. Although the results had been reasonably satisfactory as long as the concern had one plant only, the addition

[100] *Ibid.*, pp. 269–270.

of new units created rate-setting problems so complex as to lead to inconsistencies and lack of uniformity. 431

"Prior to this analysis, the management had watched, in the customary fashion, the labor market (i. e., the 'going' rates paid to typical jobs in the industry). However, the difficulties of comparing jobs in different companies were often so great as to render the results almost valueless for all but a few well standardized jobs. The problem was made more intricate by the fact that some 432 Armco processes were unique. In spite of these difficulties, numerous comparisons were made with other steel companies. The one outstanding fact evidenced by these outside studies was that the wages for several types of labor within any district where the steel industry was concentrated varied so widely as to lead to the conclusion that the 'going' rate for any given type of labor could not be defined except within very wide limits.

"It was then necessary to determine the relationship that each job bore to all others in the 433 company, irrespective of the nature of work; and to reflect this relationship in rate of pay for each one. The successful accomplishment of both these tasks demanded the formulation and acceptance of certain fundamental principles.

1. That all jobs, irrespective of the kind of work performed, may be grouped into different levels of value, or zones, depending upon 434 the amount of skill required for their successful performance.

2. That there is a logical relationship between these different zones of work from the highest level to the lowest.

3. That all jobs in the same zone should receive the same basic rate of pay within the organization, in return for which the company would expect a normal amount of effec- 435 tive work.

4. That any effective expenditure of effort over that required to make up a normal day's work should be compensated for by an incentive wage, separate from the zone rate but proportionate to it.

436 5. That the best classification of the jobs, according to their relative merit or requirements, is made by those men most familiar with all the jobs in a department.

6. That these raters will secure better results by a blanket appraisal of all the factors of skill differentiating one job from another than by an arbitrary scoring or point-rating system embodying a predetermined and therefore
437 limited series of skill factors.

7. That, in spite of the fact that there are wide variations in the wages paid for a given type of work within a given locality, any rate for that type of work in any community should have a definite relation to all other rates in that community.

8. That between those communities in which Armco has located its plants, no differential in
438 wages is justified on the basis that, by actual study, there was no difference in living costs, but that when such a differential should become apparent, and of seemingly permanent duration, the differential in wages found to be necessary should be uniformly applicable to all the zone rates of that plant.

"The formulation of these principles permitted cer-
439 tain terms to be defined as follows:

"A base, or zone, rate is one which will attract and hold with reasonable turnover the willing services of men having the requisite skill to produce the quality of product desired, without regard to extra-compensation paid as an incentive.

"As the term is employed by Armco, the skill requirement of a job includes all the elements of the job other than effort, because the individual
440 effort is compensated for by incentives. Hence, skill embodies the supervision received, the authority or supervision exercised, responsibilities other than supervisory—especially the responsibility for materials and equipment—manual dexterity, physical type, hazards involved, unpleasant working conditions, the requirements of education, previous experience, and training on the job.

"Each plant was then asked to establish what 441
it considered an equitable relationship of its own jobs to each other in terms of the skill requirements of each and without any reference to the existing amounts earned on those jobs. To have a starting point and some idea of relative levels that would later become firmly established as the classification progressed, two jobs were selected for their extreme differences in total skill requirements; one was placed near the bottom of the space provided for 442
the tabulation of jobs and the other was placed near the top.

". . . Tentatively, the list of 18 zones was selected as a standard, because this plant had listed a greater number of different jobs than any other and included every degree of skill which it was thought possible to find in any of the plants. It seemed reasonable also because three plants working independently had arrived at approximately 443
the same number of zone levels.

". . . The last step was to establish a consistent job nomenclature. Therefore, a uniform procedure for naming jobs was put into effect covering over 3,000 jobs whose proper relationships had been established by men whose opinions were deemed the most competent. Consequently, the base rates finally set were felt by the management to represent the proper compensation for the skill required for the successful performance of each job." [101] 444

Commonwealth Edison Company, Chicago, Illinois

"By 1912, the company had developed so rapidly in size and specialization of work that the Employees Committee found it necessary to have additional facilities for more effective consideration of wage and salary matters. Consequently, a payroll schedules subcommittee, reporting to the employees' committee, was charged with the responsibility of 445
establishing and maintaining what is still known as 'the classified service book of positions.' This book contains titles, brief definitions of duties and responsibilities, and schedules of pay for all positions in the company with minimum rates of $300 or less per month. Several job analysis surveys have been

[101] *Ibid., pp.* 13–16.

446 undertaken. They are sponsored by the industrial relations department as well as the employees' and payroll schedules subcommittees because both derive benefits from them.

"Since it is the policy of the company to have the personnel work carried on as far as possible by the line organization, the latter has been utilized in making the job analyses even though the number of employees has increased from 3,000 to 10,000.
447 The method used in the last comprehensive analysis, begun in 1926, was that of utilizing staff men of the industrial relations department and of the payroll schedules subcommittee for the purpose of informing the line organization as to the forms, methods, and procedures to be used in setting up the job specifications and in classifying, grading, and evaluating positions. The line organization,
448 by use of the duty statement, supplied these staff men with the necessary data which were set up in standard form. This work, as well as subsequent work relative to the classifying, grading, and evaluating of the positions was carried on jointly by the staff men and the departmental supervisory forces. In this way uniform interpretation and application of the methods and procedures used and the job data obtained were assured.

"To aid the line organization in effectively deter-
449 mining the relative importance and value of jobs, a numerical job rating scale was used. This scale was comprised of what is believed to be the fourteen principal factors contributing to the value of a position. Such factors, for example, dealt with variety and complexity of work, mental, physical, and educational requirements, supervisory or executive responsibility, and experience requirements. This job rating scale was applied by the departmental supervisory forces to the positions under their
450 administration with the assistance and guidance of the staff men." [102]

The Goodyear Tire and Rubber Company, Akron, Ohio

"Goodyear wages are set by analysis of its jobs. Some obviously require higher skill than others. For

[102] *Ibid.*, pp. 53–54.

instance, it takes from one to three years to develop 451
a good calendar man, whose job is to coat or impregnate tire fabric with rubber. If the operation is to be done with sufficient precision of gauge, temperature, and pressure for the finished products to be of uniformly high quality, the calendar man must be better paid than his neighbor who merely takes strips of rubberized fabric off the bias cutting machines and puts them on a conveyor. In all, some 10,000 separate operations have been studied 452
as to skill, fatigue, length of time to learn, noise, and discomfort. As new methods were introduced, the operations have been re-analyzed to keep the rates in balance. If rates for tire building, for instance, are too high in relation to others, many workers will want to transfer to it.

"The efficiency department has the responsibility for rate analysis, but its conclusions are checked with the practical experience of foremen and 453
production heads. The workers themselves, through the Industrial Assemblymen, also review each new rate. The base rates are thus established after an analysis of the difficulty and responsibility of each occupation, and the form of incentive payment is piecework." [103]

Westinghouse Electric and Manufacturing Company, East Pittsburgh, Pennsylvania

454
"In a large organization there are many jobs in different departments, which, although not practically identical, require the same amount of training, knowledge, and skill. In such an organization, comparisons are necessary and this involves standardization and classification of occupations and jobs as to names, requirements, and relative values.

"The objectives of the plan are:

1. Uniform rates of pay for uniform service 455
2. To keep wages for each job within a certain range of rates

"The fundamental steps in the technique are:

1. The determining upon definite names for standard occupations
2. The classifying of jobs in accordance with their value to the industry

[103] *Ibid.*, pp. 100–101.

"The details of the method are as follows:

"A list of standard names is adopted for the occupations rather than the jobs used in the industry. For example, . . .

"An analysis is made of each different job and from this information a job specification card is made giving a description of the work on that particular job and a description of the employee desired to do that work. Each job specification card shows the department using that job and the classification authorized for that work.

"All work is divided into five classes based on its relative usefulness to the company. The usefulness varies for the following reasons:

"The work may require knowledge obtained only by long experience; special manual skill which can be obtained only by long practice; unusual physical strength; initiative; or the nature of the work may involve great loss if mistakes are made, thus requiring considerable care; or the working conditions may make the job undesirable.

"On the basis of these factors, the management has classified all the work in the manufacturing departments. As an aid to this job analysis and classification, the following general descriptions were used as guides.

"*Class A:* Experimental work, model and instrument making; high-class tool work . . .

"This work demands a general knowledge of machine tools, speeds, feeds, methods and materials; also good judgment and accuracy without the use of jigs, and a high degree of skill and dependability.

"*Class B:* Work requiring accuracy, general ability and experience, but without the thorough knowledge or experience required on Class A work . . .

"*Class C:* In general, this work consists of performing one or two operations which require some accuracy and involve considerable repetition; repetitive work on machine lathes, boring mills, screw machines; operator should be able to make his own set-up.

"*Class D:* Repetitive work on one or two operations where working to close dimensions is not important; low-grade work on simple operations in Class C . . .

"*Class E:* Work which requires little, or no, previous training, and not much skill, accuracy, or knowledge . . . 461

"Every job in the shop is put in one of these five classes. A single section of the shop may have engine lathe work in three classes, A, B, and C, because it has three jobs on the engine lathe, all of different relative value. On the other hand, a section may have nothing but engine lathe work of the Class A type. 462

"Since several people may be employed in one section of the plant on a job of certain classification, differences in the ability and effort of these individuals must be provided for. Consequently, a range of rates is assigned to each class of work. In each range, the lower rates are for the less proficient workers and those just hired.

"The key sheet also furnishes an easy means of adjusting rates to conform to the prevailing wage scale. Whenever it seems advisable to authorize an adjustment of rates, it is necessary only to issue a new key sheet. 463

"The classification of occupations and rates in the works is under the supervision of the occupations and rates committees, appointed by the works manager and consisting of the superintendent of employment (chairman), superintendent of the rate and time-study department, and a secretary. This committee approves the use of new occupations and rates and investigates any unusual conditions that may arise in reference to rates of pay. A similar organization representing salaried office employees reports to the assistant of the vice president in charge of industrial relations." [104] 464

B. TRADE UNION AGREEMENTS

(1) *Trade union agreements in the photo-engraving industry in Philadelphia* [105] 465

Collective agreements in the photo-engraving industry in Philadelphia are made between the Philadelphia Photo-Engravers Union No. 7 of the International Photo-Engravers Union of North America and the

[104] *Ibid.*, pp. 212–215.

[105] Leese, Charles, *Collective Bargaining Among Photo-Engravers in Philadelphia*, Philadelphia, 1929.

466 Manufacturing Photo-Engravers Association of Philadelphia. Agreements between employers and workers in the Philadelphia market began in 1898, although no written record of those drawn before 1913 remains.

The agreements since 1913 have all been for a term of one year with the provision that any of the parties desiring an alteration of its terms at its expiration shall notify the other party 60 days before the expiration date. Otherwise, the agreement continues
467 in force from year to year. Should the old agreement expire during negotiations, it nevertheless remains in force until replaced.

As of May 1, 1928, 95 per cent of the industry in the Philadelphia area worked under closed shop conditions and collective agreement coverage.

"It is interesting to note what arguments the respective parties advance in support of their demands and proposals. . . .

468 "The arguments most frequently heard in the meetings of the agreement committees refer to economic conditions in the photo-engraving industry, what the men in other printing trades receive, what the agreements in other locals provide for, comparison of the skill required in photo-engraving with that required in other crafts, the cost of living, and the health hazards of the industry. . . .".[106]

"The cost of living receives surprisingly little attention in local negotiations. . . . When prices
469 declined in 1921, both sides agreed in the local arbitration proceedings not to use the cost of living argument and it has seldom been mentioned in other negotiations."[107]

In only two instances did a deadlock result in a stoppage of work in the industry. In all other cases agreements were reached peacefully by direct negotiation.

470 (2) *Trade union agreements in the foundry industry*

The International Molders' Union of North America and the Stove Founders' National Defense Association (now Manufacturers' Protective and Development Association) have a national trade agreement "which represents an outstanding success of over forty years' dura-

[106] *Ibid.*, p. 80.
[107] *Ibid.*, p. 82.

tion."[108] The agreement was signed in 1891 and still remains in force as a basis for wage determination. 471

"The menace of cut-throat competition created by this over-development [of the stove industry] was definitely checked by the 1891 Union agreement and its amendments providing for the equalizing of labor costs as between different pieces made in the same foundry and as between competing foundries. The rules applying these principles are:

"'The present established price of work[109] in any [illegible] should be the basis for the determination of the [illegible]ce of new work of similar character and grade, unless the presidents of the two organizations, or their representatives, shall decide that the established prices of similar work in the shop are not in accord with the price of competitive goods[109] made in the district.[110] 472

"'Any existing inequality in present prices of molding in a foundry or between two or more foundries should be adjusted as soon as practicable by mutual agreement or by the decision of the adjustment committee provided by the Conference of March, 1891.'"[111] 473

(3) *Trade union agreements in the ladies' garment industry*—1910–1935

One industry which has over a period of years attempted to set group wages on scientific bases is women's clothing. These efforts are embodied in various agreements of the International Ladies' Garment Workers' Union with the employers' associations in the different branches of the trade. Examples follow: 474

1910—The "protocol" in the cloak and suit trade in New York City established the provisions: Abolition of inside sub-contracting, charges for power, time contracts with individual employees; establishment of a regular weekly pay-day, payment

[108] Bauder, Russell S., "National Collective Bargaining in the Foundry Industry," *The American Economic Review*, September, 1934, p. 462. 475

[109] The "price of work" refers to piece work rates. The "price of competitive goods" refers to piece work rates for operations on similar products in other foundries.

[110] *Ibid.*, p. 466 quoted by the author from International Molders' Union. Conference Agreements between the I. M. U. of N. A. and M. P. and D. A., 1932, Clause 7, Conference of 1892, amended 1903, p. 4.

[111] *Ibid.*, p. 466 quoted by the author from Clause 8, Conference of 1893.

476 of wages in cash, 50-hour work week, minimum scale of wages, and price committees for the fixing of piece rates.[112]

1913—The "protocols" in the waist and dress trade, the white-goods trade, in the children's dress trade, and in the house-dress trade of New York City and in the waist and dress trade of Boston, followed the protocol of 1910 in the cloak and suit trade.

477 "The protocols in the 'women's trades,' however, contained several new features. Such, for instance, was the provision for a general minimum wage. . . . Two other features were of wider import. One was the provision for the establishment of wage-scale boards. The waist and dress protocol provided for a wage-scale board of eight members, four to be nominated

478 by the manufacturers and four by the union, and empowered this board to collect statistics, to investigate wages, to study the classification of garments in the industry, and to employ experts 'in the art of fixing prices.' The other protocols had provisions for similar wage boards. The principle underlying these provisions was the idea that it was possible to standardize the processes of work in the shops

479 and to establish 'a scientific basis for the fixing of piece and week-work prices throughout the industry' which would 'insure a minimum wage and at the same time permit reward for increased efficiency.' The other was the provision for a white sanitary label. . . ." [113]

The protocol in the waist and dress trade of New York City provided for the organization of a wage-scale board and for the adjustment

480 of piece prices. This board "was entrusted with the task of 'establishing . . . a scientific basis for the fixing of piece and week-work prices throughout the industry,' and was directed to make an investigation in order to

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[112] Levine, Louis, *The Women's Garment Workers—A History of the International Ladies' Garment Workers' Union*, New York, 1924, p. 194.

[113] *Ibid.*, p. 230.

supply facts to the Board of Grievances for the establishment of an hourly rate of pay. Pending these investigations, piece prices per garment were to be settled in each shop by the employer and by a piece-price committee selected by the workers, on the basis of a standard price per hour multiplied by the estimated number of 'solid hours' which it required a 'good experienced worker' to make the garment without interruption. . . ." [114] 481 482

1916—The protocol in the dress and waist trade of New York "embodied the results of five years of experience with protocolism in the various trades of the International, and represented an attempt to solve the various problems that had arisen in the application of the protocol under varying conditions. . . ." [115]

One feature "was the provision for the introduction of the schedule or log system in the determination of piece rates. Under the operation of this system, the garments were to be divided, as far as practicable, into working parts and a schedule rate was to be placed upon each of such parts. The rate for each part was to be based upon the estimated number of solid hours which it required a worker of average skill and experience to make the part, multiplied by the standard base rate per hour, taking into account the quality of the work required, variations in material and operating conditions in the factory, as well as the relation of such part to the other parts of the garment. Expert price adjusters were to be called in to settle any disputes which arose as to the correct division of the garment into parts.[116] 483 484

". . . One aspect of this function was to make time study tests in the shops on specific garments wherever the deputy or chief clerks disagreed in the settlement of wage disputes. But the main phase of this work consisted in 'complete work analyses' including time and motion studies, analysis of fatigue, of shop management, and of 485

[114] *Ibid.*, pp. 299–300.
[115] *Ibid.*, p. 304.
[116] *Ibid.*, pp. 304–305.

486 all other factors affecting efficiency and work. The purpose of such studies was to prepare data for the scientific organization of the system of price fixing in the shops and for the scientific management of the trade in general. . . ."[117]

1916—As a result of an agreement in the cloak and suit trade in New York City, ". . . The workers gained a reduction of working hours from fifty to
487 forty-nine a week and increases in wages. The agreement also provided for price committees and expert price adjusters and for the registration of contractors' shops. . . ."[118]

Effect of the Protocol

". . . The effect of protocolism in all the trades of the International was to improve conditions for both the workers and the employers. The former gained a levelling up of wages and
488 an improvement in general working conditions. The employers profited by the elimination of strikes and were enabled to make higher profits without any radical improvement in methods of shop or sales management. . . .

"But the first improvements which resulted from the introduction of protocolism were not followed up. . . ."[119]

"In the last analsyis, thus the protocol came
489 to an end because of two fundamental contradictions. It imposed upon the industry a demand for progressive improvements which could not be met on the existing basis of doing business. And it implied a spirit of democracy and a willingness to accept the dictates of scientific control which were in conflict with the traditions and ideology of the industry. . . ."[120]

490 However, "the protocol raised industrial relations in the industry to a plane of correctness and of mutual respect in procedure."[121]

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[117] *Ibid.*, p. 306.
[118] *Ibid.*, p. 311.
[119] *Ibid.*, p. 312.
[120] *Ibid.*, p. 316.
[121] *Ibid.*, p. 317.

"... The end of protocolism coincided with a revival in economic conditions and a 'new advance' in the organization of the International." [122] 491

1920—The engineering firm of Miller, Franklin, Basset and Co. was engaged by the Manufacturers' Association and by the Cleveland Joint Board to prepare a report on methods of wage payment. The report resulted in the creation of a Joint Bureau of Standards maintained jointly, to work out joint cost production standards in the various departments of the shops. 492

"... The Board of Referees ... was to set the minimum weekly wage rates. ... The Bureau of Standards was to set a standard wage, which was to be 10 per cent above the minimum rates. The standard of production on which the standard wage was based was to be arrived at by means of time-studies. ... The incentive to higher productivity was to be stimulated by the fact that the worker who made more garments than the standard was to be paid according to his output. Unhealthful overspeeding was to be prevented by setting a limit to the output above the standard which a worker was not to exceed." [123] 493

1932—The agreement in the dress trade in New York City made provision for the settlement of piece work rates: 494

"... (b) Should the Employer and Price Committee fail to agree [in the settlement of piece work prices] the garment ... shall be submitted to a test, the 'test hand' shall be chosen by agreement between the Employer and the Price Committee. The price of the garment to be determined by such 'test hand' shall be equaled to the established hourly rate of the 'test hand' multiplied by the number of hours it takes such 'test hand' to make a garment. 495

"(c) The hourly rate of the 'test hand' shall be established in the following manner: Two

[122] *Ibid.*, p. 318.
[123] *Ibid.*, pp. 370–71

garments of different styles on which prices have been previously settled, one to be chosen by each party, shall be given to the 'test hand' who is to do the work without interruption or interference. The time consumed on the work on such garment shall be recorded by both parties. The garment so tested shall be made under the same conditions as stock work. No garment on which the average earnings of the worker has been less than the minimum schedule of its work rates shall be selected for such test. The amount earned by the 'test hand' in making such settled garments divided by the number of hours consumed shall determine the established hourly rate of the 'test hand', the price to be in no event less than such as would yield to the minimum operator $.90 per hour for a continuous hour of work.

"(d) If, upon investigation, it should be established that the piece price has been settled below the base rate, to wit, when a representative number of workers of the shop do not earn such base rate, such price shall be resettled and all employees already paid at the original rate shall be entitled to the increase fixed by the resettlement for all work formerly done upon each garment."[124]

1934—In order to eliminate the existing system of guess and haggle from the settlement of piece work prices in the dress industry in New York, in order to remove the element of battle from the bargaining process, in order to facilitate production and in order that workers in all shops everywhere should receive the same rates for the same amount of labor, the Joint Board Dress and Waistmakers' Union of the International Ladies' Garment Workers' Union employed industrial engineers to devise a method of calculating the exact time it would take a worker to make a given dress.

[124] Collective Agreement Between the Association of Dress Manufacturers, Inc. and the Joint Board of the Cloak, Skirt, Dress and Reefer Makers' Union of the International Ladies' Garment Workers' Union, New York City, March 3, 1932, pp. 10–12.

"The Time Unit System . . . is a method 501
of calculating the exact time it will take a skilled operator to operate a given dress and a finisher to finish a dress. In order to accomplish this the dress is split up into its component parts.

"In spite of the constant change of styles, there are fundamentally certain parts of the dress that are common to all dresses at all times. These fundamental parts are called a 502
body. There are 15 possible body combinations which have been studied and their time elements determined in advance. . . ."[125]

In addition dresses have other features such as collars, sleeves of various types, yokes, pleats, sashes, etc.

"All these have been separately studied and their time determined. When the type of body and its time are established, each additional item on the dress is enumerated, and from the 503
instruction book that the system provides, the time is established. After the parts of the garments, have been enumerated, the time is totaled up, and this is the time it will take the operator to make the dress. . . .

"The system as such takes into consideration the amount of fatigue which is the natural result of the present and tense productivity in the industry. 'It also provides for time 504
taken in the usual process of work in the personal needs of the workers. . . .

"The next step in the system is to translate the units (of time) into terms of money. . . .

"The union insists upon a price (per unit) that will yield to the minimum worker his minimum wages, to the average worker his earnings above the minimum worker, and to the fast worker his earnings above the average worker. . . . 505

"Under the Time Unit System the settlement of piece rates will not be a gamble. Under the Time Unit System garments will be settled

[125] Hochman, Julius, General Manager, Joint Board Dress and Waistmakers' Union. "The Unit System of Dress Price Settlements," *Women's Wear Daily*, August 9, 1934.

506 on the actual amount of work they have. Under the Time Unit System it will be impossible for the jobbers to use one contracting shop against the other, one set of workers against the other, for the purpose of decreasing earnings. Under the Time Unit System the prices for operating or finishing will be the same regardless of whether the dress is made in a shop on 36th Street, in Brooklyn, in the Bronx, in New Jer-
507 sey or in Connecticut. It will eliminate the haggling, the bargaining and the loss of time that the piece workers face every day under the [present system] of price settlement." [126]

1935—The agreement in the cloak and suit trade made on July 11, 1935, was for a two-year period and provided:

"With respect to the Union's demand here-
508 tofore made for an increase in the above scales of wages, and the Association's objections thereto, it is agreed that the Impartial Chairman appointed hereunder shall collect data and information on the question of wages and make a report of his findings to the several parties in the industry on May 15, 1936. If the data collected shall disclose the need for wage revision, this contract shall be amended accordingly.

509 ". . . There shall be established, as soon as possible, a Labor Bureau by the Union and all parties under collective agreement with it in the coat and suit industry, under the supervision of a Labor Director to ascertain and pronounce as speedily as can conveniently be done, full and comprehensive classifications of standard types and grades of garments as a basis for piece rates provided for herein. Such
510 rates shall be based on the time consumed in the various labor operations involved in making such garments by the worker of average skill in the inside shops and in the outside shops.

[126] *Ibid.*

"When thus ascertained and pronounced such classifications and rates shall apply to all employers with whom the Union is in contractual relationship in the industry." [127] 511

(4) *Electrical Construction Industry*

The electrical construction industry has for a number of years had group wage fixing machinery in operation. The organization and functioning of this plan have been described in a publication on the work of the National Council on Industrial Relations for the Electrical Construction Industry. Excerpts from decisions of the Council are also quoted. 512

"Few documents in modern industrial history are more interesting or more advanced than that code of policies set up by the Council [i.e. The Council on Industrial Relations for the Electrical Construction Industry, organized January 26, 1920] shortly after its establishment. These policies should be read against the background of American industrial life. 513

"The commitments were introduced with the remark that the Council was not just another arbitration board, but a 'court of justice.' The Council 'proceeds upon the theory that arbitration involves compromise, which seems to mean in some minds adding up the claims on both sides of a dispute, and dividing the sum by two; while judicial settlement involves the application of definite and certain principles without any accommodation between the parties.' The 'abandonment of the philosophy of power and struggle' was at the same time announced." [128] 514

[127] Agreement of Merchants' Ladies' Garment Association, Incorporated with International Ladies' Garment Workers' Union and Joint Board of Cloak, Suit, Skirt and Reefer Makers' Union of the International Ladies' Garment Workers' Union, 1935–37, p. 11. 515
The same provisions were included in the separate agreements made with the American Cloak and Suit Manufacturers' Association, Incorporated (pp. 7–8, 11) and with the Industrial Council of Cloak, Suit and Skirt Manufacturers, Inc. (pp. 11–12).

[128] Hedges, M. H., Director of Research, International Brotherhood of Electrical Workers, *A Strikeless Industry—A Review of the National Council on Industrial Relations for the Electrical Construction Industry*, New York, 1932, p. 17.

516 The Council adopted certain code rules, among which the following are presently significant:

"(3) The public interest, the welfare and prosperity of the employer and employe, require adjustment of industrial relations by peaceful methods.

"(4) Regularity and continuity of employment should be sought to the fullest extent possible and should constitute a responsibility resting alike upon employers, wage earners, and the public. . . .

517 "(6) Industrial harmony and prosperity will be most effectually promoted by adequate representation of the parties in interest. Existing forms of representation should be carefully studied and availed of in so far as they may be found to have merit and are adaptable to the peculiar conditions of the electrical industry. . . .

"(9) Wages should be adjusted with due regard to purchasing power of the wage and to the right
518 of every man to an opportunity to earn a living, and accumulate a competence; to reasonable hours of work and working conditions; to a decent home, and to the enjoyment of proper social conditions, in order to improve the general standard of citizenship. . . .

"(10) Efficient production in conjunction with adequate wages is essential to successful industry. Arbitrary restriction of output below reasonable
519 standards is harmful to the interest of wage earners, employers and the public and should not be permitted. Industry, efficiency and initiative whenever found, should be encouraged and adequately rewarded, while indolence and indifference should be condemned. . . .

"A review of these 33 decisions reveals the Council struggling to set up new standards of procedure in the midst of the general welter of instinctive conduct. . . .

520 "Wage scales are adjusted, in so far as possible, in accord with the principles enunciated in the agreed policies. . . ."[129]

1922— "By mutual agreement between the Electrical Contractors Association of Hamilton, Ohio, and Local Union No. 648, International Brotherhood of Electrical Workers of same city, the question

[129] *Ibid.*, pp. 18-24.

of determining a wage rate for journeymen electrical workers and apprentices has been referred to the National Council on Industrial Relations for the Electrical Construction Industry. 521

". . . The employers request a reduction in the wage paid journeymen electricians prior to May first, which was ninety (90) cents per hour. . . .

"Full consideration was given the matter of under-bidding by so-called open and non-union shops. 522 The Council seriously doubts whether either wage reductions or increases would correct this condition, as experience shows there always exists a differential between the two classes of shops and where revisions downward occur in the wages of union employees, a similar reduction follows for non-union employees. The same is true when increases occur, thus leaving the gap relatively the same. It is the Council's opinion that this unsatisfactory condition 523 can be greatly relieved by real co-operation. The superior ability of union employees if diligently and efficiently applied in the interest of their employers should and would offset the monetary differential represented in wages." [130]

1922— "Under date of September 13, 1922, the Institute of Electrical Contractors of Maryland, Inc., and under date of August 22, 1922, Local Union 524 No. 28, I.B.E.W. of Baltimore, respectively, submitted to the Council on Industrial Relations requests for mediation in their wage dispute. . . . The Institute of Electrical Contractors requested a reduction in wages from $1.00 to 90 cents per hour, and Local Union No. 28 requested an increase in wages from $1.00 to $1.10 per hour. . . .

"After carefully reviewing the briefs in the case and the various conditions leading up to this 525 dispute, the Council deems it essentially fair to give some consideration to similar conditions

[130] The Council on Industrial Relations for the Electrical Construction Industry, *The Hamilton, Ohio, Wage Decision*. Bulletin No. 6, July 20th, 1922, pp. 1-2.

526 which obtain in other comparable centers. The Council also has considered to what extent, if at all, wages of skilled electricians should as a matter of economic policy be lower than the wages of other skilled mechanics, other conditions being similar, or lower than the average for electricians in cities where practically similar conditions prevail." [131]

527 1923—. There was before the Council a dispute concerning the wage rate of electrical workers in Detroit. Parties to the dispute were certain Detroit Electrical Contractors and Local Union No. 58, I.B.E.W. In presenting its decision the Council said in part:

"The Council is under a clear obligation to rest its decision on a sound principle, although it cannot always avoid some degree of compromise; but compromise is tolerated, not ac-
528 cepted, as a principle in conciliation." [132]

1923— There was before the Council a dispute concerning wages and involving Local Union No. 3, I.B.E.W., and the Electrical Contractors' Association of New York City. In its decision the Council said in part:

"The following is an extract from section 6 of said agreement:

529 'If during the term of this agreement a wage rate different from that specified shall be agreed upon by the plumbers and steamfitters and their employers in New York City, then the rates specified shall be subject to change in the manner provided in paragraph 17 hereof, and the rates so determined shall prevail. . . .'

"The obvious intent of the inclusion in article
530 6 of the clause above referred to was that if any increase or decrease in the wages of the crafts mentioned was agreed to a similar increase or decrease in the wages of Journeymen and Helpers in the Electrical Trade would follow." [133]

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[131] *Ibid., The Baltimore Decision.* Bulletin No. 7, September 26th, 1922, pp. 1–2.

[132] *Ibid., Second Detroit Decision.* Bulletin No. 10, June 1st, 1923, p. 3.

[133] *Ibid., New York City Decision.* Bulletin No. 11, June 13th, 1923, p. 2.

C. EMPLOYEE REPRESENTATION PLANS 531

(1) *Armour and Company, Chicago*

". . . The Board directed a survey of wages and conditions of work in comparable industries, to determine the true facts in these respects.

"The survey was made by joint committees of employee representatives and management representatives. These men were given time off from their labors and furnished credentials which gave them entrée at such 532 plants as they cared to visit. When they finished their survey, they recommended an increase of approximately 10 per cent and the Board adopted the recommendation and passed it on to the company executives, who made it effective." [134]

(2) *Colorado Fuel and Iron Company*

Mr. Weitzel, General Manager of the Fuel Department of the Colorado Fuel and Iron Company, in tes- 533 timony before the United States Senate Committee on Interstate Commerce in February 1920, "explained that 'we have an agreement with our miners that we will advance wages as they are advanced in our competitive districts, and we have as a competitive district the southwest, and the competitive mines, working under union agreement, next door to our mines.' " [135]

(3) *Pennsylvania Railroad* 534

"Joint fact-finding on a large scale has been a noteworthy accomplishment under the employee representation plan of the Pennsylvania Railroad. Agreement upon facts as the basis for discussion is encouraged at every step under the Pennsylvania plan. . . . There was recognized at the outset that agreement in some degree was possible, with reference to some of the facts if not to all or to the conclusion to be drawn from them. The representation plans adopted later by other 535 branches of the service on the Pennsylvania Railroad embody this same provision.

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[134] Ellerd, Harvey G., Personnel Department, Armour and Company, Chicago, "Our Experiences with Employee Representation." *Proceedings of the Academy of Political Science*, June, 1928, p. 116.

[135] Selekman, Ben M., and Van Kleeck, Mary, *Employes' Representation in Coal Mines*, New York, Russell Sage Foundation, 1924, p. 242.

536 "In May, 1923, two years after the plan was introduced in the maintenance of equipment department (employing the shop crafts) the principle of joint action was extended by providing a joint regional piece work committee to adjust complaints regarding piece work prices. . . . It called for joint *investigation* of the facts by direct observation or experimentation on the job, the piece price for which was questioned. . . . Decision respecting the adjustment to be made was to
537 be reached finally by a joint committee equally representative of the management and the employees in which a two-thirds vote of the entire membership was made determinative.

"A subsequent development of the principle of joint action occurred in October, 1923, when the conductors and trainmen agreed with the management to create a joint fact-finding committee to investigate all relevant data with reference to a v[illegible]crease which the men
538 had requested. In this ca[illegible], however, the final decision as to the action to be taken was not to be reached, as in the case of piece work prices by a two-third vote of a joint committee, but by mutual agreement as the result of negotiations. These were to follow the joint collection of facts and their joint acceptance as the proper basis for negotiations.

"The actual investigation of facts was conducted by a sub-committee of eight men appointed by the general chairman representing the two brotherhoods and
539 by the general manager. The employee members of this sub-committee consisted of a yard conductor, . . . This committee began its investigations November 15, 1923, and reported its findings February 13, 1924. As a basis for its investigations it adopted, as the considerations pertinent to the subject of a wage increase, the 'factors' embodied in the labor section of the Transportation Act of 1920, which specified eight elements, as follows:

540 A. The scales of wages paid for similar kinds of work in other industries;

B. The relation between wages and the cost of living;

C. The hazards of employment;

1. accidental,
2. occupational diseases;

D. The training and skill required;

E. The degree of responsibility;

F. The character and regularity of employment;
G. Inequality of increases in wages or of treatment, the result of previous wage orders or adjustments (this to include differentials);
H. Other relevant circumstances.

"With the aid of the company's statistical department, tables and charts were prepared, the entire compilation consisting of twenty-seven exhibits. . . .

"On the basis of such evidence, jointly accepted as facts pertinent to the issue, each side prepared its own brief as to the conclusions properly to be drawn therefrom. Negotiations in March, 1924, resulted in an increase in wages and detailed adjustments in the working rules affecting certain positions. The final outcome in this instance, it is true, was largely affected by the fact that the New York Central Railroad, shortly before these negotiations were begun, had made a settlement with its employees. This introduced an additional fact of which the negotiators took due cognizance. But the joint determination of facts cleared the ground with respect to many questionable issues.

"Substantially the same procedure was subsequently followed in negotiations with the shop crafts, the clerks, and other classes of employees. The method has come to be regarded as standard practice on the Pennsylvania Railroad as preliminary to wage negotiations. In the case of the shop crafts investigation, extensive data were gathered with reference to workers in outside industries. This was done with the aid of local committees, in each case composed jointly of management and employee representatives, which made visits to more than four hundred establishments, 383 of which submitted information which was used, being considered comparable with conditions in railroad shops. These local committees went into the factories and observed the various jobs to determine their similarity with work performed for the railroads. In addition to the question of wages, these committees obtained information regarding hours of work, overtime, and special perquisites such as vacations, stock distribution, insurance, sick leaves, and other similar provisions." [136]

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[136] Burton, Ernest Richmond, *Employee Representation*, Baltimore, 1926, pp. 191–194. The plan was first introduced in 1921.

546 "Fact Finding Committees Result of Plan

"The spirit of cooperation and fair dealing engendered by the operation of the Pennsylvania plan has been extended to cover the settlement of the most vital questions that arise in the relations between men and management.

"For instance, the last wage adjustment affecting the train service employes was settled after a joint fact-finding committee equally representative of officers and employes had been appointed to develop all
547 the facts which they felt had a bearing on the question at issue. They examined officers of the company on financial matters, interviewed government officials and statistical agencies and employers and employes in outside industries. Other fact-finding committees were appointed in other classes to develop the facts bearing upon wage questions which they had raised." [137]

548 **D. GOVERNMENT BOARDS AND COMMISSIONS**

(1) *United States Railroad Administration*, 1918–1920

Railroad Wage Commission

The Railroad Wage Commission, created on January 18, 1918, had the following duties:

"The commission shall make a general investigation of the compensation of persons in the railroad service, the relation of railroad wages to wages in
549 other industries, the conditions respecting wages in different parts of the country, the special emergency respecting wages which exists at this time owing to war conditions and the high cost of living, as well as the relation between different classes of railroad labor." [138]

Board of Railroad Wages and Working Conditions

The Board of Railroad Wages and Working Conditions
550 was created on May 25, 1918, as an advisory board to the Director General of Railroads. It was "the duty of the board to hear and investigate matters presented by railroad employees or their representatives affecting—

[137] Pennsylvania Railroad Company, *Employee Representation—The Pennsylvania Railroad Plan*, Philadelphia, 1925, p. 59.

[138] United States Railroad Administration, *Report of the Railroad Wage Commission to the Director General of Railroads, April 30, 1918*, Washington, D. C., 1918, General Order No. 5.

"1. Inequalities as to wages and working conditions whether as to individual employees or classes of employees. 551

"2. Conditions arising from competition with employees in other industries.

"3. Rules and working conditions for the several classes of employees, either for the country as a whole or for different parts of the country." [139]

The reports of the board were submitted as recommendations and were, in general, accepted and incorporated in the Supplement to General Order No. 27 issued by the Director General. 552

(2) *Transportation Act*, 1920 [140]

Title III. Disputes Between Carriers and Their Employees and Subordinate Officials [141]

(Effective February 28, 1920) 553

"Sec. 307. . . .

"(d) All the decisions of the Labor Board in respect to wages or salaries and of the Labor Board or an adjustment board in respect to working conditions of employees or subordinate officials of carriers shall establish rates of wages and salaries and standards of working conditions which in the opinion of the board are just and reasonable. In determining the justness and reasonableness of such wages and salaries or working conditions 554 the board shall, so far as applicable, take into consideration among other relevant circumstances:

(1) The scales of wages paid for similar kinds of work in other industries;

(2) The relation between wages and the cost of living;

(3) The hazards of the employment;

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[139] United States Railroad Administration, Director General of Railroads, General Order No. 27, with its supplements, addenda, amendments, and interpretations as to June 30, 1919, Washington, D. C., 1919, p. 27. 555

[140] United States Statutes, 66th Congress, 2nd Session, Chapter 91.

[141] Title III was repealed on May 20, 1926, and was replaced by the Railway Labor Act. The validity of the principles of wage determination, outlined in Title III, Section 307 (d) of the Transportation Act of 1920 was conceded by the railroads and by their employees. A thorough study of the operation of this Act was made by H. D. Wolf in a book entitled, *The Railroad Labor Board*, (Chicago, 1927) *q.v.*

556 (4) The training and skill required;
(5) The degree of responsibility;
(6) The character and regularity of the employment; and
(7) Inequalities of increases in wages or of treatment, the result of previous wage orders or adjustments."

(3) *Classification of positions in the civil service of New*
557 *York State*, 1932 [142]

The following are statements from the report of the Joint Legislative Committee on Classification of Positions in the Civil Service, transmitted to the Legislature on January 21, 1932. The classifications recommended by the Committee have been adopted by the New York State Civil Service Commission for all positions in the State service except in institutions and in the State Insurance
558 Fund.

"The project covered by this report involved a study of approximately 35,000 positions in the civil service of the State of New York, scattered throughout the State, and disclosed that there are some 1400 distinct kinds or 'classes' of positions calling for different qualifications for entrance. . . .[143]

"The need for such an undertaking as that described has been generally recognized for many
559 years. In 1915 and 1916 a classification and compensation study was made, under the auspices of a legislative committee known as the Horton Committee, but the plans then developed failed of adoption for reasons having no connection with their merit or the need for them. Again in 1922, under the administration of Governor Miller, a classification of positions was begun under the direction of the then, and the present, Director of the Budget, but the work was abandoned at the close of that administra-

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[142] State of New York, *Report of the Joint Legislative Committee on Classification of Positions in the Civil Service.* Transmitted to the Legislature January 21, 1932, Legislative Document (1932), No. 55, Albany, 1932.

[143] *Ibid.*, p. 13.

tion and no practical results came of it. It was not 561
again until 1930, that the inertia that too often hampers progress in public administration was overcome sufficiently to result in provision for undertaking the work again.

"The project dealt with in this report was authorized and undertaken largely on the initiative of the Association of State Civil Service Employees, which urged that such a study be undertaken, stating the belief that it would reveal, among other things:

(a) Inequalities in the salaries paid for positions 562
involving like duties, responsibilities, and qualification requirements.

(b) Variations between departments and bureaus as to personnel policy toward salary rates, promotions, and other conditions of employment.

(c) Entrance salaries too low to attract the best types of service.

(d) Instances where the State is paying for posi- 563
tions calling for experience or technical service, considerably less than the rates of private enterprise for similar service.

(e) Promotions and salary increases without due regard for either the merit and service of the individual or the real value of the duties performed.

(f) The lack of any uniform or systematic recognition of meritorious service by periodic salary
increases. 564

"The finance committees of the Legislature and the executives of the State had sensed for years the inequities of pay and the vague and misleading titles that have been prevalent. . . . The Civil Service Commission had long felt the need for a systematic and significant classification of positions according to their true character, and for properly related salary rates, perhaps more keenly than any other agency concerned. . . .[144]
565

"The project now completed was publicly endorsed by the leading spokesmen of both the legislative and the executive branch of the government. . . .

"In the course of the work of actually classifying the positions in the service, the Committee has fully proved for itself that such inconsistencies and in-

[144] *Ibid.*, p. 22.

566 equities, such lack of plan and system in personnel matters, as were previously believed to exist, actually do pervade the service. . . .[145]

"Above all, there is no basis for determining the correct rates of pay for different positions, absolutely or in relation to each other. . . .[146]

"It is to be understood that the proposal for adoption of a classification plan merely advocates applying to the state's employments the same processes of
567 classification and definition that have been used to simplify the complex problems encountered in all other branches of science and human endeavor. . . .

"The procedure in developing such a classification involves a number of steps. The following statement of these steps will, in itself, serve to explain the nature of the classification plan:

1. That of getting together at one time and in one place the actual, essential facts as to the duties and
568 responsibilities of all the positions in the service to be classified.

2. That of finding out, by analysis of these facts, how many, and what, distinct kinds of employment there are in the service—that is, positions whose actual duties and responsibilities call for employes of distinctly different qualifications from those of all other positions in the service.

3. That of designating each kind of employment
569 so found to exist as a definitely-established 'class,' with a distinctive title, to distinguish it from others of different kinds.

4. That of defining each class in clearcut, written 'specifications,' definitely setting up the duties, responsibilities, and qualification requirements that positions of the class have in common and that distinguish them from positions of other classes.

5. That of 'allocating' or assigning each position in the service to its appropriate class according to
570 its actual duties, responsibilities, and qualification requirements, and thus definitely earmarking each position as being of a clearly-defined kind or 'class,' to be known thereafter by the specific title of the class, so that there can be no doubt of the real nature of the position. . . .[147]

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[145] *Ibid.*, p. 23.
[146] *Ibid.*, p. 34.
[147] *Ibid.*, p. 35.

"One of the most important uses and purposes of a consistent and comprehensive classification of positions is in the determining of compensation rates. Such a classification provides a basis of relation between different kinds of employment on which specific rates can be founded. Without some such orderly plan as a sound classification to provide a background, any attempt to fix rates that will be fair and equitable is hopeless from the start. There is nothing to tie to, no definite points to which the rates can be related. . . .[148] 571

"With the relative value of different kinds of work, represented by separate classes thus definitely determined and clearly set up in an orderly schedule of scales of pay applicable, the personal element of the value of the incumbent on such work as that of the class can be determined as a separate and distinct matter and be given effect in the fixing of the individuals rate within the scale for his class. . . . 572

"With such a plan in operation, the determination of the compensation rate for any individual position becomes almost automatic. The duties of the position determine its class; the class determines the scale of pay applicable. . . .[149] 573

". . . A great mass of comparative data as to rates of pay in employments of similar and related kinds in outside employment in New York State, and those in public employments of neighboring states and other states with similar problems and the ideas of employees and administrative officials as to the rates that should apply, has been brought together and analyzed. Suggestive scales of pay have been developed on the basis of these data, for the several classes of positions covered by the classification plan. . . .[150] 574

"The methods followed in the conduct of the work have followed closely the standard practice that has been developed, and progressively improved upon, in the course of recent years.

"The Horton Committee report followed the lines largely in vogue up to that time of dividing positions rather roughly into broad services, groups, and grades 575

[148] *Ibid.*, pp. 36–37.
[149] *Ibid.*, p. 38.
[150] *Ibid.*, p. 39.

576 which were stressed as the important elements of the classification. Ultimate classes of like positions, now recognized as the vital and basic elements in classification, essential for the systematic control of personnel processes, were not clearly recognized, and to a large extent the concepts of final classes were not developed at all.

"The present classification follows the lines laid down in 1919 and 1920 in the Canadian classification and the
577 original federal classification of positions in the District of Columbia, as developed and improved upon in later projects, notably those of Montreal, Baltimore, Philadelphia, Detroit, Cleveland, Maryland, New Jersey, and Massachusetts, the recent work of the Personnel Classification Board in the federal service, and that in the State of California, and in other recent projects. This practice and procedure is well summed up as standard practice in the proceedings of technical groups of leading authorities
578 in the field of public personnel administration. . . .[151]

"There are no available facts or figures of wide enough scope and sufficiently particularized application to afford any dependable basis of fixing any defensible plan of variations from place to place within the State. Nor in the light of studies that have been made along such lines, would such a basis be provided even if huge expenditures were to be made for detailed studies of costs and rates of pay from locality to locality. . . .[152]

579 "It has been expressed as an essential idea of consistent compensation scales that they should be based upon the principle of like pay for like work. If they are to have any fairness and equity the likeness of the work should extend not only to the nature of the work performed, but to its quantity and its quality. . . .[153]

"No matter how sound and consistent any classification and compensation plans might be at the time of their adoption, they will not put themselves into effect or apply themselves in operation. In fact, even the best of
580 systems will not even 'stay put' because the service itself

[151] *Ibid.*, p. 40.
[152] *Ibid.*, p. 46.
[153] *Ibid.*, p. 49.

is not a static thing, but a live and growing organism 581
subject to the continual flux and change. The classification and compensation plans based upon it, must therefore change currently as required to keep in touch with the service. Therefore, provision for an agency to provide for currently administering and making changes in the plans in effect to keep them adapted to the service and to outside conditions, is a necessity if the classification and compensation plans are to continue to be effective. . . .[154] 582

"The more recent trend of developments has been in the direction of constructive, trained service in all matters related to personnel, rather than mere protection against spoils. Such protection is not weakened however, but strengthened, by being made part of a broader personnel program. . . .[155]

"Such principles are advocated by such bodies as the National Civil Service Reform League, the Assembly of 583
Civil Service Commissions, and other nation-wide organizations, and the leading individual authorities, in the public personnel field.

"New Jersey has recently adopted a new civil service law drafted along these lines. Wisconsin and California have also taken action in the same direction. Many other jurisdictions have taken at least some steps toward the formal adoption of the new concept of comprehensive and constructive service, or practical steps toward im- 584
provement of their working procedures through classification and compensation plans, improved testing techniques, and other details of the broader plans. Systematic classification and compensation plans, the most basic of all the necessary improvements, have been most general in their acceptance. The governments of the United States and Canada, the states of Massachusetts, New Jersey, Maryland, Wisconsin, and California, the cities of Chicago, Milwaukee, Baltimore, Cleveland, Detroit, Montreal, and many others, have placed classification and 585
compensation plans in effect and have improved their operating procedures by basing them on such plans."[156]

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[154] *Ibid.*, p. 51.
[155] *Ibid.*, p. 53.
[156] *Ibid.*, p. 54.

586 **E. MEDIATION AND ARBITRATION AWARDS, 1924–1934**

Boston Elevated Railway Co. and Division 589 of the Street Railway Union, Boston, Mass., Arbitration Award, October 15, 1924

"The principle which applies to the relation between wages and the financial condition of employers, as generally stated by arbitration boards, by Federal judges in receivership matters and by such authorities as Justice
587 Higgins, of the Arbitration Court of Australia, and Chief Justice Taft when chairman of the War Labor Board, is, in substance, that the employee is not a partner or joint adventurer, sharing in profits and losses, and that his remuneration ought not to depend on these contingencies. . . .

"It is proper, however, to say in this connection, lest the fairness of the company as an employer be questioned, that employment with it is practically as permanent as the employee may desire. . . .
588 "The only question, however, that we are now concerned with is that of the wage. Taking into consideration all the relevant factors, the nature of the employment itself, the prices paid for labor in many of the trades, the wages paid to motormen and conductors in certain large cities of the country, the persistently high cost of living and the several budgets of family expenses, while we think that 75 cents an hour, would, under more favorable conditions, constitute a just and
589 fair basic wage, in the present circumstances, giving due consideration to the present trend of the company's income and to the total outgo entailed by an increase, we are of opinion that 72½ cents an hour is a reasonable hourly wage, and we accordingly fix it in that amount."[157]

Order of Railway Conductors and the Brotherhood of Railroad Trainmen, employed on fifty railroads in
590 *the eastern part of the United States, Arbitration Award under Railway Labor Act, December 1, 1926*

An award was made of an increase in pay of 7½ per cent over the existing rate, instead of 19 per cent increase that was asked by the employees. The award was made "after full consideration of all the conditions and circumstances presented in the record, and of

[157] United States Department of Labor, Bureau of Labor Statistics, *Monthly Labor Review*, January, 1925, pp. 116–117.

the peculiar, exacting, hazardous, and responsible char- 591
acter of the services performed by these employees." [158]

American Express Co. and employees connected with Local Union No. 658, International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, St. Louis, Missouri, Arbitration Award, January 18, 1927

"The questions referred to the board were:

(a) Are the employees of the American Ex- 592
press Co. in vehicle service in the city of St. Louis, Missouri, receiving rates of wages that are just and reasonable?

(b) If the board decides they are not receiving just and reasonable wages, what shall their wages be?"

In answering these questions the board observed:

"(1st) The scale of wages paid for similar kinds of work in other industries in the city of St. Louis; 593

"(2nd) The training and skill required;

"(3rd) The degree of responsibility;

"(4th) The character and regularity of the employment."

The board reached the conclusion that the existing wages were not just and reasonable, and ordered increases according to the type of work.[159]

594

Printing Pressmen and Newspaper Publishers, Portland, Oregon, Decision by the International Board of Arbitration for the Industry, on appeal from award by local arbitrator.

"It is also urged that the pressmen should be provided with an adequate differential for their skill and for the requirements of their occupation. That skilled workers should receive higher wages than the unskilled is granted. The present scale, however, provides a very 595
liberal differential for the pressmen. Their hourly rates are, for example, virtually double those of the unskilled labor."

The issue was raised as to whether the wage scales prevailing over the Pacific Coast as a whole, which were

[158] *Ibid.*, January, 1927, p. 222.
[159] *Ibid.*, May, 1927, p. 262.

596 appreciably higher than those for the rest of the country, should be ordered in Portland. Pacific coast wages in general exceeded those in Portland not merely in the pressmen's trade, but for virtually all crafts and industries.

"There remains only the question as to whether the productivity of industry in general and the financial prosperity of Portland newspapers in particular does not justify an increase in wages. That there has been
597 an unprecedented increase in per capita productivity since 1921 is evident." [160]

Omaha Typographical Union No. 190 *and three newspapers published in Omaha, Nebraska, Arbitration Award, February* 17, 1927

"1. Relative wage: It is the chairman's judgment that in education, intelligence, skill, and resourcefulness the printer stands very high among, if not the sum-
598 mit of, the crafts and that this is reflected in the annual wage of printers relative to other crafts in Omaha....

"Underlying the whole argument of relative wage is the assumption that a proper scale has been reached in all crafts except the one under consideration; a groundless assumption. . . .

"2. Cost of living: This important factor in wage adjustment has been presented at length. . . .

"3. Hazards: The hazards of this craft can not be
599 rated very high. The danger of lead poisoning... can be provided against by methods of hygiene, very largely within the control of the worker....

"4. Training and skill: The requirements are very high, and if less manual dexterity is needed then in certain other crafts, this is balanced by the higher demands on education and intelligence.

"5. Responsibility:" The union has enforced high standards of performance by refusing countenance to
600 careless and indifferent workers. It has shown morale and loyalty, for it is not charged that the quality of service has deteriorated in the frequent wage disputes that have supervened.

"6. Character and regularity of employment:" The point is rejected that "because a business is continuous

[160] *Ibid.*, August, 1927, pp. 222–223.

throughout the year, so must the laborer work continu- 601
ously. This is a matter of adjustment of load to the personnel that is to carry it." Some employers "enforce vacations from an enlightened sense of their own interest, to promote efficiency and improve morale. . . .

"Effect of increased wages: The publishers urge that increase in wages can be only at the expense of other workers unless such increase be accompanied by increased per capita production.... There is an underlying assumption that the present ratio of the distribution 602
of income is the best possible.

"Scale of other cities: The union submits the rates of a number of western cities, all materially higher than Omaha....

"Consequences to publishers: This is implied to be ruin, or near-ruin, to two of the papers, a most unwished-for calamity to the city. The contrary union point of the ultimate advantage derived from the destruction of industrial enterprises which are parasitic upon labor is logical, but extreme."[161] 603

Shop Crafts—Chesapeake & Ohio Railway, Arbitration Award, under the Railway Labor Act, April 14, 1928

"In our opinion other factors that influence wages ought to be given consideration along with inequalities of wages. It is admitted by both parties to this case that wages should not be equal for all kinds of work. It 604
is just and reasonable, for example, that a difference should exist between the wages of a coach cleaner and the wages of a machinist, or between the wages of a brakeman and the wages of a conductor. The reason for a difference is this: That the factors which determine wages vary in strength from one kind of employment to another. Thus all employees must bear some responsibility, but some must bear more than others; in railway employments all may be said to incur some hazards, but some incur more than others; all are 605
subject to some physical and mental strain, but some are subject to more strain than others; all require some strength, skill, and experience, but some require more than others.

[161] *Ibid.*, May, 1927, pp. 263–264.

606 "Some of the factors that determine wages, such as those that have been mentioned, are natural, but there are others which are purely artificial. Taken together they are numerous, and it is the variable force that they exert which brings about different wages for different employments. Certain artificial factors sometimes operate in such a manner as to cause injustice and discrimination to certain classes of employees. Hence arise, at times, wage differentials that are unfair and
607 unreasonable. . . .

"The factors that determine wages vary not only from one employment to another, they vary also within each employment from one period to another. Changes that differ widely among different employments both in frequency and extent take place in methods, processes, equipment, and organization. It follows that alterations occur in the hazard, the strain, the responsibility, the requisite skill of employees, in the productivity of their labor, and in other factors that determine wages. . . .

608 "The Board of Arbitration is asked to decide that because the wage relationship is different, it is therefore unjust. But the board cannot pronounce the existing wage relationship unjust and unreasonable solely for the reason that it differs from the relationship which was established under Federal control nearly a decade ago. We cannot accept the theory that wages in different employments should be made to rise or fall by equal amounts regardless of diverging changes that may take-
609 place in the wage factors that deserve to be considered." [162]

Mortarmen—Portland, Oregon, Conference and Arbitration Board, Rate Effective January 1, 1930

"A rate of $8.00 per day for mortarmen is considerably higher than that paid any place in the country with the exception of a few of our largest cities. Seattle,
610 the nearest comparable city in all respects and with a probably slightly higher cost of living, pays $6.50 for this class of work.

[162] *Ibid.*, June, 1928, pp. 176–177.

"Plasterers' tenders in Portland receive $9.00, and this differential between bricklayer's tenders and plasterers' tenders exists with some exceptions throughout the country, plaster work being generally considered harder work. However, when mortar is mixed by hand and when bricks and mortar are carried by hod the difficulty of the two tasks is on a parity and no logical reason for such differential exists." [163] 611

H. C. Aberle Co., Inc., and its Hosiery Workers, Philadelphia, Pa., Arbitration Board, April 14, 1930 612

"The adjustment . . . is believed to place this plant on a competitive level with other plants in this are in respect to the operations listed. . . .

"As to wage rate determinations there is ample opportunity to practice job analysis and time study with profit both to the management and the workers. As is quite generally the case in this industry, there is a noticeable failure to classify jobs according to the skill 613 required. An unbalanced wage scale results. The first essential of a satisfactory scheme of wage payment is that it shall be easily understood by those affected. Perhaps the most frequent cause of complaint of those employed in the knitting department has been the difficulty in computing earnings. We believe that the present system should be altered so as to meet these objections." [164]

614

The Milwaukee Leader and Newswriters' Union, Local No. 9, *Milwaukee, Wis., Arbitration Award, May* 2, 1934

"The arbiter has given serious consideration to the arguments made by both parties on the question of the justification of higher pay and the ability of the publisher to increase wages to any considerable degree. The publishers did not combat the union's arguments for the justice of increased pay. They did not refute the 615 evidence presented by the union that the wages of Leader editorial department employees are below the average of other newspapermen. The publishers called attention to extraordinary hazards encountered because

[163] *Ibid.*, April, 1930, p. 131.
[164] *Ibid.*, June, 1930, pp. 114–145.

616 of the character of the newspaper as an exponent of the cause of labor; its restricted field of advertisers; its struggle for the existence of the newspaper. . . .

"It is not the custom to establish wages according to the minute qualifications and abilities of the individuals of a particular group. Wage scales are usually set on the least amount an averagely competent employee shall work for. When, in the light of what is accepted as competency, an employee is not worth the minimum, he
617 should not be a burden on the whole crew. For this reason a provision is inserted in most working agreements recognizing the circumstances under which an employer is not required to retain an employee. Extraordinary ability is expected to be compensated at a higher rate than the minimum." [165]

F. THE FOLLOWING ARE EXCERPTS FROM PROFESSOR FEIS' BOOK:—A COLLECTION OF DECISIONS PRESENTING PRINCIPLES OF WAGE SETTLEMENT.[166] THIS MATERIAL COVERS THE PERIOD FROM 1900
618 **TO 1923**

"The collection is not designed as an argument in favor of any one set of principles for use in American industry. It is intended to present all the more important principles that have been in use. . . . The whole collection is but material to feed the reader's judgment, not an attempt to convince that judgment. . . ." [167]

619 **"I. Problems of Wage Settlement Connected with the Practice and Principle of Wage Standardization**

"THE CHARACTERISTICS OF THE STANDARD WAGE

"The introduction of the principle of wage standardization into industry may be traced to two dominant tendencies. These are first, the tendency toward standardization of the processes of production, second, the growth of collective bargaining. As a result of the first tendency it has come about that large numbers of
620 men, members of the same craft, perform work of essentially the same kind and difficulty under conditions

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[165] *Ibid.*, September, 1934, p. 713.

[166] Feis, Herbert, *A Collection of Decisions Presenting Principles of Wage Settlement*, New York, 1924.

[167] *Ibid.*, p. 5.

approximately similar. As a result of the second tendency, a natural expectancy has grown in the minds of these large numbers of men that, making exception for those who are well below or above the rest in ability or experience, the basic wage for all of them should be the same; or in other words that the wage received should not vary with the fortunes or practices of the particular enterprise in which they are employed, or with the relative bargaining power of different individuals. 621 622

". . . . Ordinarily demands for wage standardization in a craft or industry hitherto unstandardized, have taken the form of a demand for the general payment of the higher range of wages already being paid by some employers of the craft. . . .

"The principle of standardization has been well defined as a means 'designed to abolish within a given area the multiplicity of rates paid for similar service by the application of one standard rate for each occupation, minor differences in the nature of the work due to 623 *varying physical and other conditions being disregarded.*' Where the principle is applied, the possible influence on the wage bargain of the economic position of the individual wage earner, and the effect of differences of policy and efficiency of different employers, is greatly lessened. Furthermore, in the case of competitive industries, the use of this principle tends to prevent individual enterprises from gaining advantage by pressure upon wage rates. For this reason employers 624 frequently favor the principle.

"Standard wage rates are designed to be minimum rates for the occupations for which they are set—applicable to all those workers in the occupation who are at or around the average in ability and experience. . . . It is well confirmed that they do not necessarily become maximum rates, nor even in many cases approximate that result. Any satisfactory standardized wage scale recognizes all significant differences between various 625 kinds of work and competency."[168]

Report of the United States Anthracite Coal Commission (1920)

"The board of conciliation shall act as a commission to make a study of, and report to, the Joint Conference

[168] *Ibid.*, pp. 13–14.

626 at the expiration of this contract, or sooner if practicable, the matter of uniformity in day rates for the several occupations of day men of the respective collieries in the anthracite field. . . .'' [169]

Ladies' Garment Industry, Cleveland, Standard Wage Scale, Effective May 1, 1921

''Any employee enumerated in the annexed schedule
627 during the first year of his, or her, employment in the trade, shall receive the following wages:

''Men

For the first six weeks.....	$14.00 per week
For the next 4½ months.....	17.00 per week
For the next six months.....	20.00 per week

''Women

For the first six weeks.....	$12.00 per week
628 For the next 4½ months.....	14.00 per week
For the next three months.....	15.50 per week
For the next three months.....	17.00 per week

''Piece prices shall be computed on a basis that will yield to workers of average skill and experience the rates specified for each class.

''*Overtime*—All week workers and piece workers shall receive pay at the rate of time and one-half for overtime. For piece workers; computed as follows: total
629 earned for the week on normal basic rate divided by number of hours of work, and for each overtime hour shall receive additional pay at one-half the regular hourly earnings.'' [170]

Cases of Employees v. *Worthington Pump and Machinery Corporation, etc. Decision of Umpire, War Labor Board, Docket No.* 163 (1918)

630 ''The . . . argument . . . that because the old system of classification is a natural growth no change must be made, is an argument which if taken literally would

[169] *Ibid.*, p. 15.
[170] *Ibid.*, p. 16.

have destroyed all progress in the past. If a change is 631
wise on its merits, the mere fact that it may change or alter a natural growth should not prevent its being adopted. . . .

". . . I believe that the principle of classification by trades is sound. I base my belief on the following grounds:

A. It is simple and practicable. The classification of workers by their various trades, as distinguished from 632
the present system of classification, by the various machines, is simple and practicable. . . .

B. It makes it easier to grade the men according to their skill. . . .

C. It tends toward the establishment of standards, and the ascertainment of actual facts. . . ."[171]

United States Shipbuilding Labor Board, Atlantic Coast, Gulf and Great Lakes Award (1918)

633

". . . We have adopted these uniform national rates because experience has convinced us that by this means only can we put a stop to that shifting of employees from yard to yard and district to district which continues to be a chief obstacle to efficient ship production. . . .

"In substituting uniform national rates for the shipyard employees in the different crafts for the diverse rates previously established, so far as this seemed practicable, we have not always been able to give full weight 634
to local conditions. Since the results will be of benefit to the great majority of the employees affected, we feel confident that the minority, who may be less benefited, will cheerfully accept the change in the interest of the greatest good to the greatest number. . . ."[172]

Rochester Clothing Industry, Decision, Labor Adjustment Board, Case No. 2 (1919)

"After going over all the evidence and the arguments, 635
the Chairman was convinced that there is no great difference in the amount of product turned out by those who are now receiving only $25.00 and $26.00 and those receiving $29.00 or more. These inequalities in rates of pay for different men doing the same kind of work

[171] *Ibid.*, pp. 18–19.
[172] *Ibid.*, p. 22.

636 seem to be the underlying cause of dissatisfaction among the workmen who entered the complaint. In the judgment of the Chairman it is important to remove this cause of dissatisfaction. . . ." [173]

History of the Shipbuilding Labor Adjustment Board (1921) Standardization of Piece Rates

". . . The board believed that a uniform piece-rate scale would spur the poorer yards to bring their equip-
637 ment and management to the level of the best. . . .

". . . Conferences were held, under the chairmanship of the secretary of the board, with joint committees representing the yard owners and the different piecework crafts to secure as far as possible joint recommendation as to scales of piece rates that would be fair and reasonable under all of the circumstances. Both sides showed an admirable desire to agree upon a fair scale of rates, and such merit as the scales finally approved
638 by the board may have had was largely due to the work of these joint committees. . . .

". . . With some modifications the joint recommendations were approved and proportional rates fixed for work for which no joint recommendations were forth-coming. . . ." [174]

Rochester Clothing Industry, Award, Case No. 36. Fashion Park Rates for Cutting (1921)

639 "The general rule in considering cases of serious and unjust inequalities as well as in fixing piece rates has been to use the earnings of the workers as the primary consideration and not the rates. . . . The main purpose of the parties to the agreement in fixing the wage levels for the market is to secure substantially the same earnings for workers of equal skill and who exert about the same amount of effort in the various houses." [175]

"Wage Standardization and the Competitive Situa-
640 tion Within an Industry

"One of the strongest arguments for the use of the principle of standardization is that it tends to put all

[173] *Ibid.*, pp. 25–26.
[174] *Ibid.*, pp. 27–29.
[175] *Ibid.*, pp. 32–33.

competing units of an industry within the area of 641
standardization in a position of equality in respect to the wages paid for the various kinds of labor employed. When wages are standardized no competitive advantage can be secured by the payment of wages lower than those paid by competitors. . . . This, it is argued, is of advantage both to the workers and to the more efficient firms in the industry, which can pay the comparatively higher rates. It is assumed in this argument, that the level of standardization, the uniform wage scale adopted, 642
will be that which the more efficient units can afford to pay, rather than the contrary. When the level of standardization is determined by arbitration or adjudication such is usually the case; when the matter is left entirely to collective bargaining it tends to be decided by the relative bargaining power of workers and employers."[176]

Cigar Makers' International Union, Resolution No. 18 *offered to the* 1920 *Convention* 643

"Whereas, the cigar makers in local unions are working at prices in some instances ten to twenty dollars cheaper per thousand and lower than cigar makers and unions of different localities, and, Whereas, cigar manufacturers are taking advantage of the situation, moving their factories or establishing branches of them in cheaper districts. . . . be it resolved by this Convention that the Cigar Makers' International Union adopt as one of its aims the securing of a uniform bill of prices, 644
taking into consideration all the local conditions and necessities of the trade and local interests of the cigar makers, etc. . . ."[177]

Rochester Clothing Industry in matter of the request of the union for equalization of wages in Rochester with other clothing markets, Decision, Impartial Chairman, August 25, 1920

"Under ordinary circumstances it cannot be doubted 645
that a request to equalize labor costs with competing employers and markets is a just request. The intelligent and informed public opinion of America no longer considers it sound industrial policy to permit employers to seek advantage in competing with one another by

[176] *Ibid.*, pp. 33–34.
[177] *Ibid.*, p. 35.

646 getting the same kind of labor at lower wages. Competition among employers should be in efficiency of management, salesmanship and service to consumers, not in getting cheap labor. . . .

"The Chairman is therefore of the opinion that on account of the serious conditions prevailing in the clothing industry in Rochester as well as in other clothing markets no general increases can be granted at the present time." [178]

647 *Shirt Industry, New York City, Board of Arbitration, Decision Case No.* 37 (1923)

". . . The New York shirt market is the only unionized market in the United States and the manufacturers are compelled to compete with non-union out-of-town companies which manufacture not only the cheap grades of shirts but large quantities of the better grades. . . .

648 ". . . The Union says that while recognizing that the manufacturers in this market do have the competition of non-union out-of-town manufacturers, yet there are specific advantages accruing to the New York market. That the larger part of the work done here is on the higher grade shirts on which the competition is limited. That the workers in this market are better skilled than in most of the competing markets, which results not only in a better grade of work but in higher

649 production. . . ." [179]

"WAGE STANDARDIZATION—AND DIFFERENCES IN THE CHARACTER OF THE WORK PERFORMED AND IN THE CONDITIONS UNDER WHICH IT IS PERFORMED

"No matter how highly standardized an industry is, there are differences both within and between the units of the industry in the character of the work carried on by workers of the same craft, and differences in the

650 conditions under which this work is performed. Sometimes these differences are relatively large, sometimes relatively small. Therefore in all attempts to employ the principle of standardization the question arises as to whether the rates established for any type of work

[178] *Ibid.*, pp. 47–48.
[179] *Ibid.*, p. 57.

should be uniform despite these differences, or whether 651
the standard wage rates should be varied on account of them. . . .

"Behind each dispute on this subject there is likely to be a dispute over facts. . . ." [180]

Eastern Railroads v. *Brotherhood Locomotive Engineers, Award, Board of Arbitration in Dispute* (1912)

". . . The engineers in their requests for standardization do not mean the same pay for all kinds of service. 652
The requests involve classification of service. . . .

"The wage schedule now in force in the Eastern, Southern and Western districts shows that the principle of uniformity, with respect to certain points, has been recognized by all American railroads.

". . . The Board holds to the view that the nature of the service rendered is the paramount factor, and that if any standardization takes place, the fact must 653
be recognized that where there is greater responsibility or greater strain there should be larger pay, and this without respect to whether the division operated belongs to a large system, or is independent.

". . . Whatever standardization is attempted by the Board will therefore be by classification of service rather than by classification of roads. . . .

"Many trade unions have succeeded in getting the principle recognized that for any class of service there 654
should be a minimum compensation. . . .

". . . In the opinion of the Board it is desirable that all the factors which enter into the nature of the service should be taken into account, and that the more arduous and difficult service should have greater compensation. With this point of view, the Board feel that at the present time they have gone as far toward establishing uniformity of pay as is practicable, by introducing a minimum wage for each of the important classes of service. . . ." [181] 655

[180] *Ibid.*, p. 61.
[181] *Ibid.*, pp. 63–65.

656 "WAGE STANDARDIZATION—AND GENERAL DIFFERENCES IN ECONOMIC CONDITIONS BETWEEN THE PLACES IN WHICH THE INDUSTRY IS LOCATED

"Like so many other questions connected with the principle of standardization, it may be affirmed that no general rule will meet all cases satisfactorily, and that the 'degree' of the differences in question must be one of the guiding considerations." [182]

657 *U. S. Administration for Adjustment of Labor Differences in Packing House Industries, Decision—Arbitrator* (1920)

"It seems that in the Fort Worth and Oklahoma City plants the common labor rate is 50 cents or thereabout, instead of 53 cents as generally elsewhere in the industry, and one of the demands is to make the rate in these places equal to that in the others. . . . If, however,
658 there was no basis whatever for this distinction, I would be strongly inclined to make the advance in these places. But I find it to be a fact that the usual common labor rates prevailing in these places are in the main somewhat lower than common labor rates in other centers. It was probably out of this that the original difference arose, and I am satisfied there has been no change in this regard up to the present time. I am therefore not now inclined to make the changes in this
659 respect demanded. . . ." [183]

Milwaukee Newspaper Publishers v. *Milwaukee Typographical Union No.* 23, *Findings of Arbitrators,* 1923

". . . The mere fact that a certain wage scale permits such reasonable improvement in living conditions as comes to all of us is not, therefore, necessary evidence that the wage is too high. . . .

660 "It seems impractical to segregate the needs of one group of men in one city for a certain period of time and arrive at a conclusion as to what they ought to receive. The problem is necessarily it seems to us, a relative one and necessarily involves comparisons.

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[182] *Ibid.*, p. 82.
[183] *Ibid.*, pp. 84–85.

"It occurs to us that we can profitably make, among 661
others, the following comparisons:

(a) We can compare the proposed wage scale with wages paid for similar service in other of the larger cities.

(b) We can compare these proposed scales with wages paid at other times, here and elsewhere. (Taking into account in the comparisons mentioned (a) and (b) the varying factor of the cost of living.) 662

(c) We can compare the local scale and its trend over a period of years with the general trend of wages among newspaper printers and industrial workers in general over a similar period. . . ." [184]

"THE PRINCIPLE OF STANDARDIZATION AS APPLIED TO OCCUPATIONS CARRIED ON IN MORE THAN ONE INDUSTRY 663

"It can be stated confident'y that the differences in wages between sections of a craft employed in different industries will always tend to be relatively small—assuming that the advantages and disadvantages of employment in the several industries are approximately equal." [185]

Brotherhood of Maintenance of Way Employees vs. *Alabama and Vicksburg Railway Co. et al., U. S. Railroad Labor Board Decision No.* 1267 (1922) 664

"The Labor Board in its present decision considers all the seven elements or factors set out in the transportation act, 1920, for its guidance in fixing just and reasonable wages, but lays special stress upon the first, which reads as follows: 'The scale of wages paid for similar kinds of work in other industries.' . . .

"In view of these facts and circumstances and all the evidence adduced in this case, the Labor Board is of the 665
opinion that a conservative increase of wages is clearly due to the three groups of unskilled labor and to the section foremen. . . ." [186]

[184] *Ibid.*, pp. 211–212.
[185] *Ibid.*, p. 87.
[186] *Ibid.*, pp. 159–160.

666 "II. **Principles for Settling Wage Differentials Between Different Kinds and Classes of Workers**

"The forces governing 'wage differentials' . . result from a complex combination of changing influences acting more or less haphazardly; they are governed partly by the relative supply and demand situation for different classes (which in turn is largely governed by the abilities required for each type of work, the advantages and disadvantages offered, etc.), partly by differences in or-
667 ganization and bargaining power, partly by the influence of customary differentials....

"In establishing or revising differentials the principles most generally used are (1) that they should justly represent the differences in training, skill or other abilities required for the different kinds of work, (2) that they should allow for differences in advantage and disadvantage in the different kinds of work, (3) that they should be sufficient to attract into every one of the
668 occupations (especially the skilled ones) a sufficient supply of labor and no more....

"The organized bargaining strength of the various grades of workers is usually an important factor in settling wage differentials, whether they are settled by collective bargaining or any other means....

"*How many* differentials should be established, as contrasted with how large they should be, is a question of classification. . . . The question of which and how many differentials it is just and practical to establish is a
669 question of judgment, taking into account the habits and interests of workers, employers and the public...." [187]

New York Employing Printers Association v. *Mailers Union No. 6, Arbitration,* 1920

"In the first place a good deal of dissatisfaction was expressed with the differentials existing between the wages of the various crafts in the industry. The Board had no authority under the existing contract to consider
670 this question. Moreover differentials between various crafts could be adjusted properly with reference to skill and ability required only if one board were arbitrating the cases of all the crafts. Had this been done, or had

[187] *Ibid.*, pp. 111–113.

the three arbitrators who sat in the eight cases acted as 671
one board, it is possible that a better adjustment might have been made in the rates of pay for the various crafts with respect to the differentials between them...."[188]

San Francisco Building Industry, Awards and Reports of Impartial Wage Board, 1922 *and* 1923

Award for 1922—"The task of the Board was to ad- 672
just wages equitably, approximating as closely as possible a compensation which should be a true measure of the value of the service. If the Board could have been guided by the sole consideration of rewarding labor exactly according to skill or economic value, the task would have been comparatively simple. But such a scheme of appraisement, though ideal in theory, is not feasible in practice. While skill should be largely the determining factor of compensation, it cannot, of neces-
sity, be controlling.... 673

"The Board had to bear in mind the lack of continuity of employment in many crafts....

"....There is the further consideration of the varying hazard to life and limb of employment in certain crafts. Where the jeopardy to life and limb is great, the craftsman is legitimately entitled to higher compensation.

"In some of the trades the Board was compelled to recognize a distinct shortage of craftsmen....

"The compensation prescribed is that which is to 674
prevail for the general average skill in the crafts, still permitting allowances in individual instances for adjustments based on variations from that average...."

Award for 1923—"It would serve no purpose to restate the basis adopted by the Board for the establishment of a wage scale, which basis is fully set forth and detailed in the report accompanying the wage scale established for the year 1922. It is, however, necessary to indicate that the wage scale now established differs 675
from that of the year 1922 only in the case of a very few crafts....

"With respect to the increases established it is to be noted that in most instances these have been dictated by the unusual conditions now prevailing in the building industry....

"The compensation prescribed is that which is to

[188] *Ibid.*, p. 114.

676 prevail for the general average skill in the building crafts, permitting allowances in individual instances based on variations from that average. Variations downward, however, shall be permitted only in the case of individuals who, by reason of old age or physical disability, are no longer capable of performing the work of the average mechanic. This is simply in accordance with a custom which has long prevailed in this community. On the other hand, there shall not be denied
677 to the individual mechanic possessing greatly superior skill additional compensation warranted by the superiority of his output." [189]

III, IV, V

These sections deal exclusively with cost of living and are therefore omitted since this argument concerns itself only with principles of wage determination on the basis of value of services rendered.

678 **"VI. The Principle of 'Comparison with Wages in Other Industries'**

". . . . . The conclusion offered in this—that under present circumstances the principle of comparison will not work satisfactorily as a basic principle of wage settlement, but can be a useful subsidiary to such others as are used. Its best service comes as a check to their operation, or to the operation of unregulated
679 economic forces. It is a principle by which it may be possible to avoid the more extreme and most troublesome of unjustified wage differences between industries. On the one hand its application would tend to prevent extreme depression of wages in any industry. . . . On the other hand extreme use of bargaining power by particular groups of wage earners could be discouraged if and when it was judged that the public interest was seriously threatened. . . .

"It is both desirable and inevitable that in the settle-
680 ment of wage disputes some comparison between wages in different industries should take place, and the principle under discussion represents that conclusion. It is also fairly evident that this principle must be used in combination with other principles, and in the editor's opinion, secondary to them—as a check upon them. . . ." [190]

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[189] *Ibid.*, pp. 120–122.
[190] *Ibid.*, pp. 341–342.

Boston Elevated Railway Company and Boston Carmen's Union, Decision 589, *Report of Board of Arbitration* (1914)

"On the whole, we think that the evidence relating to other occupations is not very helpful in determining what the wages of blue-uniform men should be. So far as the conductors and motormen are concerned, wages of cigar-makers, printers, or men engaged in the printing trades, are not very helpful, though it was proper enough that they should be introduced, and the Board, in determining the question whether the blue-uniform men should have an increase and what the increase should be, has given some consideration to this line of evidence offered on behalf of the men. . . .

"So far as the shopmen are concerned these outside wages have distinctly more bearing. . . .

"It is also true, we think, that an employee of the Elevated or most of the employees of the Elevated, are given continuous work throughout the entire year, and are not obliged to lose time in turning from one job to another, or to lose time because of the usual seasonal fluctuation which occurs in the building trades or to lose time because of the recurring greater fluctuations due to two or three years active building construction followed by a year or two of dullness. . . .

"The wage rates of other Massachusetts street railway companies have a vital and direct bearing upon the question of wages in Boston. . . ."[191]

Brotherhood Railroad Signalmen vs. *Atchison, Topeka and Santa Fe Railway System et al., United States Railroad Labor Board, Decision No.* 1893 (1923)

"In so far as the building trades are concerned, they furnish no safe criterion at this time by which one can be guided in the fixing of wages for railway employees. . . . The supply of labor is not equal to this extraordinary demand. Hence, the abnormally high wages in the building industries. . . .

". . . Against this factor, however, the railway employees will consider, and the Railroad Labor Board must consider, the irregularity of employment in the building trades as compared with the continuity and steadiness of the employment of the particular class of

[191] *Ibid.*, pp. 345–346.

railway employees in question. . . .

"The question as to what extent the Board should consider an upward trend in the wages paid in other industries, unaccompanied by any appreciable increase in the cost of living, is a difficult one. This one factor alone might in some instances justify a wage increase. It will rarely happen, however, that it exists without the concurrence of other factors of more or less weight." [192]

Alabama and Vicksburg Railway Company et al. v. *U. S. Brotherhood of Maintenance of Way Employees, etc., et al., United States Railroad Labor Board, Decision* 1028 (1922)

"The Labor Board is of the opinion that after the reductions made under this decision, common labor on the railroads will still be receiving, as a rule, a wage in excess of that paid to similar labor in other industries, and that the same will be true of all other classes of labor covered by this decision. The board is of the opinion, however, that the hazards and hardships of the employment, the training and skill required, the degree of responsibility to the public, and other elements mentioned in the statute, combine to justify the payment of a better wage to these employees than is paid to similar labor in outside employment. . . .

"Moreover, the board is not in sympathy with the idea that a governmental tribunal, empowered to fix a just and reasonable wage for men engaged in serving the public in the transportation industry, should be controlled by the one consideration of the low wages that may be paid to other labor in a period of temporary depression and unemployment. It is but just to say that railway managements have indicated no desire for such a result." [193]

[192] *Ibid.*, p. 352.

[193] *Ibid.*, pp. 362–363.

"DIFFERENCE IN REGULARITY OF EMPLOYMENT AS A REASON FOR WAGE DIFFERENCES BETWEEN INDUSTRIES." 691

Ladies Garment Industry, Cleveland, Decision of the Board of Referees No. 3 (1921)

1921 *Decision*—"Since July, 1918 when the Board of Referees undertook its duties in Cleveland, two notable advances in the conditions in the industry have been made—(1) the establishment of a standard wage scale 692 affecting all shops and all classes of workers—(2) the adoption of production standards now well on the way to installation. The next desirable step to be taken is to break up one of the vicious features of seasonal industry by providing for as much continuity of employment as is practicable. The manufacturers express their belief that a reduction in wages at this time will of itself greatly stimulate trade and insure to the workers a reasonable amount of continuity with its accompanying 693 larger annual earnings. . . . We do not feel that this will be of itself sufficient or that the risk should be thrown entirely upon the workers. We, therefore, believe that the time has come when the regular workers in the industry are entitled to a guaranteed minimum period of work or compensation for the lack of it. Such guaranty is a proper and necessary burden on the industry, an obligation which the manufacturers of Cleveland have always recognized. It is all the more desir- 694 able and justified in this industry in Cleveland because the workers have for the past year contributed their full share, at heavy expense to the Union, to the creation and establishment of standards of production." [194]

"VII. The Principle of Wage Adjustment with Reference to Production

"There has always been a widely entertained opinion especially among employers that wages should be adjusted 695 with reference to production. This opinion has been given expression in a variety of ways and in different systems of wage payments. . . .

"It comes about that no matter what theoretical claims are made for this principle, it is rarely accepted as the sole basis of a wage settlement. Somewhere in

[194] *Ibid.*, p. 370.

the course of wage negotiation the question of the basic rate or earnings—to be paid for an ordinary amount of effort or output—must be agreed upon. And in settling the basic rate, study must be, and is, given to facts outside of individual or group production and the employer's calculation of unit labor cost. The principle of the 'adjustment of wages with reference to individual or group production' becomes merely an adjunct to wage policy, albeit an important one.

". . . As one element in a general policy it may be applied: (1) so as to result in the adjustment of individual wage rates or earnings to individual production—as in the various systems of payment by results; (2) so as to result in the adjustment of the wage rates or earnings of each and all the workers of a class in an enterprise or industry to the production of them all. These two methods may be combined in various ways. . . .

"We can turn to the second method by which the principle of wage adjustment with reference to production may be applied—adjustment to the production of all workers of a class in an enterprise or industry. . . . Usually they have taken the form of establishing definitely by agreement a minimum standard of production to be given by each worker for the agreed upon standard time rate (a rate established by bargaining or by the use of some such principles as are presented in preceding chapters). Such, for example, is the minimum standard of production set for linotypers in the printing industry.

"If and when such a standard of production is established it may be sound and practicable to adjust wages in that industry to changes in the established standard. . . .

"Even when no definite minimum standard of production has been established in an industry it is entirely possible that this principle should be invoked in wage controversies. There are many instances of wage demands based on the claim that the workers concerned have been producing more than formerly, or that their productive efficiency has increased. A recent controversy over the wages of postmen may be given as an instance of this kind, the increased volume of mail handled per postman being one of the leading arguments put forward in favor of the demand for a wage increase. There have been also demands for wage reduc-

tion based on the claim that the production of the workers has fallen off. 701

"The great difficulty in passing judgment upon cases of this type is that in modern industry it is far from easy to establish the causes of any change in the production or productive efficiency of any grade of workers—even if the change itself can be established. The technique of industry changes often, many different crafts are usually employed upon the same product. Managerial methods change. Workers and employers are apt to assign a different reason to changes in production. Yet that is not sufficient reason for not considering the use of this principle in demands of this type—to the extent that the facts can be ascertained. . . ." [195] 702

Leather Goods Industry, New York City, Decision, Impartial Chairman (1921)

"In addition to this award, the arbitrator is of the opinion that there ought to be some increase in production. The lack of records, however, makes it impossible to say how much this should be. Lack of records also makes it impossible to say for what part of the increased production would additional pay be justified. All that that the arbitrator can do under the circumstances is to order in general terms that production must be increased. Details should be worked out by people permanently connected with the industry, such as the arbitration committee, the impartial chairman, and the production committees. 703 704

"These should set to work immediately to install a method of measuring increases or decrease in production. If this is done and by January 1, 1922, the arbitration committee or the impartial chairman find on investigation that production has not improved any or has decreased, a decrease of 5 per cent in all wage rates shall be ordered. . . ." [196]

705

Hat and Cap Industry, New York City, Agreement (1922)

"Immediately upon the signing of this agreement, arrangements shall be made by the union and the association to continue the negotiations that have been

[195] *Ibid.*, pp. 375–378.
[196] *Ibid.*, p. 385.

going on immediately preceding the signing of this agreement for the establishment of a reasonable and uniform standard of production in the trade." [197]

"Upon 'Supply and Demand' as a Principle of Wage Settlement

". . . After a search through the literature of wage disputes, one of the outstanding impressions I am left with is how seldom any effort has been made to give any precise definition to that principle and that expression, or to point out what settlement would be dictated by it in any controversy. . . .

". . . The chief reason is that the principle does not meet the expectations of the present-day industrial world in regard to the matters that should be taken into account in deciding a wage controversy. Workers, employers, the interested public are propounding other questions. Is the wage enough to live on decently compared to current standards of working class life? Can the industry afford to pay more and maintain its strength? Must the wage be reduced in order to aid the industry out of a passing depression? etc. Current opinion is inquiring into these matters and others that seem to it pertinent, and is not satisfied to know merely how much must be paid to hire the men standing outside the factory gate, or employed in another industry. And the principles used in the settlement of wage disputes must represent the effort to find an answer to the questions most constantly asked, if they are to be satisfactory. If public interests insistently introduce ethical or semi-ethical considerations into the issues at dispute, if workers believe the methods of production may be improved, for example, some measure of attention must be given to considerations such as these. That is the chief reason why the principle of 'supply and demand' stated as a policy of wage settlement is found to lack the requirements of a satisfactory policy." [198]

Boston Elevated Railway Company and Boston Carmen's Union, Division 589, *Report of Board of Arbitration* (1914)

"The Company set up as its first argument bearing upon the question of wages that it can secure plenty

[197] *Ibid.*, p. 381.
[198] *Ibid.*, pp. 390–391.

of men at its present scale of wages, and therefore should not be obliged to advance wages. 711

"The evidence does seem to show that the Company can ordinarily secure plenty of men at its present wage scale. The line of evidence is important, and, we think, should be given weight.

"So far as motormen and conductors are concerned we think this line of evidence has less weight than when applied to other employees.

"The record does show that the Company can secure plenty of blue-uniform men, but the record also shows that at the present wage scale the Company cannot hold them in its employ. . . . 712

"It may perhaps be urged that this is of no concern to any one, provided the Company can replace with a new man each dissatisfied man who leaves. But we can hardly accept this view, at least for a Company operating the large heavy modern cars with their powerful motors and high rates of speed through congested city streets. . . . 713

"The men have a right to organize; they have a right to strike as a body. . . . A strike is much to be regretted, not lightly to be undertaken, and unquestionably to be condemned if it is unnecessarily ordered. . . . But it is not in the interest of the men, of the Company, or of the Community to settle the question in this way. In our judgment, the ease with which the Company is securing from day to day employees at the existing wage scale to replace the normal vacancies is a factor to be carefully weighed, but it does not wholly determine the question, especially in the case of motormen and conductors." [199] 714

"Upon the Wage Questions Brought up by the Introduction of New Machinery, and the Principles Upon Which they may be Settled

"These decisions like all others in the volume are printed merely as material for critical judgment, not because of the particular policy they represent." [200] 715

[199] *Ibid.*, pp. 395–396.
[200] *Ibid.*, p. 426.

716 *Rochester Clothing Industry, Board of Arbitration, Case No. 14 (1921)*

"In accordance with General Ruling No. 5 relating to machinery, the firm notified the Union of its intention to introduce five pressing machines in its inside shop, and a joint committee representing the Union and the employer investigated the conditions in the shop and the provision made to protect the pressers against loss due to the introduction of the machines. The com-
717 mittee being unable to reach a final adjustment in the matter, it was referred to the Board of Arbitration. . . .

"In deciding cases of this character the Board is bound by the general rule agreed upon by both the Union and the employers that machines may be introduced on condition that the workers do not suffer thereby.

". . . The rules laid down in General Award No. 5 were designed not to prevent the use of machinery but
718 to regulate its introduction in order to protect the worker against injury and loss. These rules having been met in the present case the employer has a right to introduce the machines. . . ."[201]

Rochester Clothing Industry, Board of Arbitration General Award and Ruling No. 5 (1921)

"Pursuant to Section XX of the agreement providing that the question of the installation of new ma-
719 chinery and the effect thereof on the worker shall be submitted to conference, representatives of the Union and of the employers have been meeting in the office of the Board of Arbitration to work out regulations governing the introduction of various kinds of machines. Because of special conditions surrounding the use of different kinds of machines they have been discussed in separate conferences, and different sets of regulations will be made for different kinds of
720 machinery.

"On the general question of the desirability of the use of machinery there is no disagreement between the Union and the employers. Both parties express the desire to promote progress of the industry by the use of new inventions and new machinery. The Union asks, however, that this progress be not at the expense

[201] *Ibid.*, pp. 431–432.

of the wage-earners, that regulations be established 721
which will safeguard the wage-earners against injury or loss from the introduction of new machines. In general it was agreed that new machines should be introduced on condition that the workers do not suffer thereby." [202]

Report of the United States Bituminous Coal Commission (1920)

722

"The United Mine Workers, through their president, have stated their position on the introduction of machinery and other mechanical devices that tend to increase production and efficiency in the mining industry. The statement fully accepts in principle the desirability of the introduction of such machinery and devices. . . .

"Pending the joint district agreement between the miners and operators covering a fair schedule of rates for piece work or tonnage operation of any new device 723
or machinery, the right of the operator to introduce and operate any such new device or machinery shall not be questioned, and his selection of such men as he may desire to conduct tests with or operate such device or machinery shall not be in any way interfered with or obstructed by the miners or their representatives, provided the wages offered are at least equal to the established scale rates for similar labor. . . .

"In like manner new or untried systems of mining, 724
for instance, long wall, retreating long wall, or the panel system, may be introduced by the operator for the purpose of conservation, increasing production, the lessening of cost, or, in the interest of safety, without his right to make such change being abridged; provided, however, that for this class of work the mine worker shall in the same manner receive the equivalent of the contract rates for the class of work displaced, plus a fair proportion of the labor-savings effected." [203]
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[202] *Ibid.*, p. 427.
[203] *Ibid.*, pp. 432–433.

726 **VIII—LEGISLATION IN OTHER STATES AND COUNTRIES ON HOURS AND WAGES** [204]

Government regulation of the hours and wages of women workers is by no means new.

Since 1886 New York State has had **legislation limiting women's hours of work**, and hours-legislation in other states dates back to 1847. Today
727 44 states have hours regulations (all except Alabama, Florida, Iowa and West Virginia). The list of states, with the year when the first law was passed regulating working hours of adult women, follows:

1847 New Hampshire
1848 Pennsylvania
728 1849 Maine
1851 New Jersey
1852 Ohio
1858 Minnesota
1863 South Dakota
1863 North Dakota
1867 Wisconsin
729 1874 Massachusetts
1885 Michigan
1886 Rhode Island
1886 New York
1887 Louisiana
1887 Connecticut
1889 Georgia
1890 Virginia
730 1890 Oklahoma
1893 Illinois
1899 Nebraska
1901 Washington
1903 Colorado
1903 Oregon
1908 Tennessee
1909 Missouri
1911 South Carolina
1911 Utah
1911 California
1912 Maryland
1912 Kentucky
1913 Montana
1913 Vermont
1913 Idaho
1913 Delaware
1913 Arizona
1913 Texas
1914 District of Columbia
1914 Mississippi
1915 Wyoming
1915 North Carolina
1915 Arkansas
1915 Kansas
1917 Nevada
1921 New Mexico

[204] Compiled by the Women's Bureau of the United States Department of Labor. The most recent statutes or amendments are not necessarily included. For list of publications used, see Appendix, Bibliography, VIII.

In 1934, 38 states had **laws restricting the working hours of men** in some occupations in private employment. Many states, whether or not they regulate such hours, have legislation requiring the observance of an 8-hour day on public works. 731

The following foreign countries have **hours legislation,** usually applying both to men and to women, and in some cases dating back to the early part of the 19th century: 732

Argentina
Australia
Austria
Belgium
Brazil
Bulgaria
Canada
Chile
Colombia
China
Costa Rica
Cuba
Czechoslovakia
Dominican Republic
Ecuador
El Salvador
Estonia
France
Great Britain
Greece
Guatemala
Holland
Honduras
India
Italy
Lithuania 733
Luxemburg
Mexico
New South Wales
New Zealand
Nicaraugua
Norway
Panama 734
Peru
Poland
Portugal
Roumania
Russia
Spain
Sweden
Switzerland 735
Uruguay
Venezuela
Yugoslavia

736 Seventeen states and 21 foreign countries have **minimum wage laws** which are now in effect.

The states, with dates of passage of the laws, are as follows:

Massachusetts 1912 (new law—1934)
California 1913
737 Colorado 1913
Minnesota 1913 (for minors only)
Oregon 1913
Wisconsin 1913
North Dakota 1919
South Dakota 1923
738 Washington 1913
Connecticut 1933
Illinois 1933
New Hampshire 1933
New Jersey 1933
New York 1933
Ohio 1933
Utah 1933 (earlier law 1913)
Rhode Island 1936

New Zealand passed the first minimum wage law in 1894. Other countries which have enacted minimum wage laws since that time are as follows:

New Zealand
Australia (by province)
Great Britain
739 Germany
France
Mexico
Canada (by province)
Argentina
Norway
Union of South Africa
Czechoslovakia
740 Hungary
Uruguay
Spain
Italy
Russia
Chile
Ecuador
Costa Rica
Cuba
Peru

The following states have other legislation dealing with the **payment of wages** and the method, form, time or frequency of such payment: 741

Arizona	Montana
Arkansas	Nevada
California	New Hampshire
Colorado	New Jersey
Connecticut	New Mexico 742
Florida	New York
Georgia	North Carolina
Idaho	Ohio
Illinois	Oklahoma
Indiana	Oregon
Iowa	Pennsylvania
Kansas	Rhode Island 743
Kentucky	South Carolina
Lousiana	Tennessee
Maine	Texas
Maryland	Vermont
Massachusetts	Virginia
Michigan	Washington
Minnesota	West Virginia 744
Mississippi	Wisconsin
Missouri	Wyoming

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Table I—Gainfully Occupied Persons in Relation to the Total Population, by Sex, New York State, 1900–1930[1]

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Sex and Census Year	Population 10 years old and over	Persons 10 Years Old and Over Gainfully Occupied		
		Number	Per cent of population 10 years old and over	752
Total				
1930	10,513,933	5,523,337	52.5	
1920	8,402,786	4,503,204	53.6	
1910	7,410,819	4,003,844	54.0	
1900	5,801,682	2,996,474	51.6	753
Male				
1930	5,259,861	4,108,232	78.1	
1920	4,186,818	3,367,909	80.4	
1910	3,727,218	3,020,158	81.0	
1900	2,877,822	2,324,429	80.8	
Female				
1930	5,254,072	1,415,105	26.9	
1920	4,215,968	1,135,295	26.9	
1910	3,683,601	983,686	26.7	
1900	2,923,860	672,045	23.0	754

[1] Compiled from *Fifteenth Census of the United States, 1930, Population, Volume IV, Occupations, by States*, Table I, p. 1083.

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756 Table II—Gainfully Occupied Women in Relation to Total Persons Gainfully Occupied, New York State, 1900–1930[1]

Census Year	Total number of persons 10 years old and over gainfully occupied	Women 10 Years Old and Over Gainfully Occupied	
		Number	Per cent
1930	5,523,337	1,415,105	25.6
1920	4,503,204	1,135,295	25.2
1910	4,003,844	983,686	24.6
1900	2,996,474	672,045	22.4

[1] Compiled from *Fifteenth Census of the United States, 1930, Population, Volume IV, Occupations, by States*, Table 1, p. 1083.

758 Table III—Proportion of Females 10 Years Old and Over Gainfully Occupied, by Age, New York State, 1900 and 1930

Age	Total number	Gainfully Occupied	
		Number	Per cent
1900[1]			
Total	2,923,860	672,045	23.0
10 to 24 years	1,026,181	332,383	32.4
25 to 44 years	1,149,242	247,875	21.6
45 years and over	744,569	90,711	12.2
Unknown	3,868	1,076	27.8
1930[2]			
Total	5,254,072	1,415,105	26.9
10 to 24 years	1,661,540	555,951	33.4
25 to 44 years	2,075,012	603,712	29.1
45 years and over	1,512,240	253,412	16.8
Unknown	5,280	2,030	38.4

[1] *Twelfth Census of the United States, 1900, Vol. II, Population*, pp. 72–73; *Special Reports, Occupations*, Table 41, p. 351.

[2] *Fifteenth Census of the United States, 1930, Population, Vol. IV. Occupations, by States*, Table 8, p. 1112.

Table IV—Duration of Employment in the Same Industry, Compiled from Special Studies, 1913–1934

Industry and Locality	Date of study	Total number of women reporting	Per Cent of Women Employed in the Same Industry —		Source
			5 years and over	10 years and over	
Hotels and restaurants — New York State	1934	8,945	[1] 25.6	[1] 7.0	N. Y. Department of Labor, Wages and Working Conditions in Hotels and Restaurants, unpublished data.
Beauty shops — 4 cities	1933	1,163	54.3	21.4	U. S. Women's Bureau, Bulletin No. 133, p. 23.
Glove industry — Fulton County, N. Y.	1933	563	[1] 23.8	[1] 9.2	U. S. Women's Bureau, Bulletin No. 119, p. 7.
Cigar industry — 11 states	1929–30	11,885	51.1	28.6	U. S. Women's Bureau, Bulletin No. 100, p. 152.
Cigarette industry — 5 cities	1929–30	2,374	52.3	25.7	*Ibid.*, p. 157.
Slaughtering and meat packing — 13 cities	1928	760	52.5	18.6	U. S. Women's Bureau, Bulletin No. 88, p. 55.
Various industries — industrial women attending adult education classes	1928–30	608	[2] 76.6	[2] 37.7	U. S. Women's Bureau, Bulletin No. 89, p. 41.
	1925	97	[3] 99.0	[2] 47.4	U. S. Women's Bureau, Bulletin No. 54, p. 4.
Various industries — Manchester, N. H.	1919–20	533	40.7	19.3	U. S. Women's Bureau, Bulletin No. 30, p. 93.
Millinery industry — New York City	1914	1,351	57.8	22.9	N. Y. Factory Investigating Commission, 1915, Vol. II, p. 419.
Shirt industry — New York State	1913	8,887	31.5	14.4	*Ibid.*, p. 204.
Paper box industry — New York State	1913	7,330	34.9	14.7	*Ibid.*, p. 263.
Candy industry — New York State	1913	5,265	22.2	8.6	*Ibid.*, p. 332.

[1] These figures apply to length of employment with the same firm.
[2] These figures apply to length of employment "in industry", not necessarily in the same industry.
[3] Includes women with 4 or more years' experience "in industry."

766 Table V—Proportion of Married Women 15 Years Old and Over Gainfully Occupied, New York State, 1890–1930[1]

Census Year	Total number	Gainfully Occupied	
		Number	Per cent
767			
1930	2,738,973	328,460	12.0
1920	2,134,604	194,305	9.1
1910	1,793,558	156,515	8.7
1900	1,393,915	66,090	4.7
1890	1,149,954	42,968	3.7

[1] *Fifteenth Census of the United States, 1930, Population, Volume IV Occupations, by States*, Table 14, p. 1161.

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Table VI—Proportion of Married Women in Various Industries, Compiled from Special Studies, 1913–1934

Industry and Locality	Date of study	Total number of women reporting	Percentage which married women formed of all women employees	Source
Hotels and restaurants — New York State	1934	8,918	29.9	N. Y. Department of Labor, Wages and Working Conditions in Hotels and Restaurants, unpublished data.
Beauty shops — 4 cities	1933	1,216	23.7	U. S. Women's Bureau, Bulletin No. 133, p. 22.
Glove industry — Fulton County, N. Y.	1933	636	40.0	U. S. Women's Bureau, Bulletin No. 119, p. 7.
South Bend, Ind.				
All industries	1930	3,243	43.7	U. S. Women's Bureau, Bulletin No. 92, p. 8.
Manufacturing industries		2,094	48.9	
Clerical		624	22.4	
Sales		179	39.7	
Cigar industry — 11 states	1929–30	13,791	39.3	U. S. Women's Bureau, Bulletin No. 100, p. 151.
Cigarette industry — 5 cities	1929–30	2,387	38.6	*Ibid.*, p. 156.
All industries — Newburgh, N. Y.	1929	1,314	28.5	N. Y. Department of Labor, Bureau of Women in Industry, mimeo. report, p. 13.
Binghamton, N. Y.				
All industries	1926	4,227	48.2	N. Y. Department of Labor, Bureau of Women in Industry, Special Bulletin, p. 16.
Manufacturing industries		3,461	51.1	
Laundries		71	54.9	
Mercantile establishments		667	32.8	
Restaurants		28	46.4	
5 and 10 cent stores — New York City	1921	1,039	23.0	N. Y. Department of Labor, Special Bulletin No. 109, p. 24.
Millinery industry — New York City	1914	1,346	5.4	N. Y. Factory Investigating Commission, 1915, Vol. II, p. 421.
Button industry — New York City	1913	286	3.1	*Ibid.*, p. 343.
Shirt industry — New York State	1913	8,996	11.1	*Ibid.*, p. 179.
Paper box industry — New York State	1913	7,456	5.5	*Ibid.*, p. 233.

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776 Table VII—Plant by Plant Comparison of Hourly Earnings of Women in Six Industries, New York City, 1935[1]

Plant Number	Number of women	Median earnings (cents)	Range of Earnings (Cents)		Per Cent of Women Earning —		
			Lowest	Highest	Less than 25 cents	Less than 30 cents	40 cents and more
777							
All occupations — candy factories							
2	3	40.0	30.0	56.3	.....	.....	66.7
3	24	31.3	27.1	33.3	.....	4.2	.....
4	67	34.6	28.7	37.1	.....	4.5	.....
6	2	[2]	35.0	62.5	.....	.....	50.0
7	3	40.0	35.0	45.0	.....	.....	66.7
8	51	30.2	20.8	44.7	40.0	39.2	3.9
9	15	29.2	29.2	45.0	.....	93.3	6.7
10	88	41.0	40.0	74.0	.....	.....	100.0
12	4	40.4	36.0	45.0	.....	.....	50.0
14	7	32.9	32.8	38.3	.....	.....	.....
15	83	35.0	30.0	70.0	.....	.....	26.5
16	19	35.0	22.5	42.5	5.3	.....	1.6
17	4	59.5	45.0	62.9	.....	.....	100.0
778 18	17	33.7	30.4	78.6	.....	.....	5.9
19	3	35.0	35.0	35.0	.....	.....	.....
21	2	[2]	35.0	62.5	.....	.....	50.0
22	3	35.0	35.0	37.5	.....	.....	.....
23	533	29.2	29.1	102.9	.....	95.1	3.6
Packers — candy factories							
2	1	[2]	30.0	30.0	.....	.....	.....
3	19	31.3	27.1	33.3	.....	5.3	.....
4	43	34.6	28.5	37.1	.....	7.0	.....
6	2	[2]	35.0	62.5	.....	.....	50.0
7	1	[2]	35.0	35.0	.....	.....	.....
8	30	34.5	27.4	44.7	.....	10.0	6.7
779 9	15	29.2	29.2	45.0	.....	93.3	6.7
10	28	40.0	40.0	41.0	.....	.....	100.0
12	4	40.4	36.0	45.0	.....	.....	50.0
15	8	35.0	35.0	37.5	.....	.....	.....
16	16	35.0	22.5	38.0	6.3	6.3	.....
18	17	33.7	30.4	78.0	.....	.....	5.9
19	3	35.0	35.0	35.0	.....	.....	.....
21	1	[2]	35.0	35.0	.....	.....	.....
22	3	35.0	35.0	37.5	.....	.....	.....
23	315	29.2	29.1	31.5	.....	95.9	.....

[1] New York State Department of Labor, Division of Women in Industry and Minimum Wage, *Wages of Women in Six Industries, New York State, 1935*, unpublished report, 1935.

[2] Not computed owing to small number involved.

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Table VII—Plant by Plant Comparison of Hourly Earnings of Women in Six Industries, New York City, 1935[1]—*Continued*

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Plant Number	Number of women	Median earnings (cents)	Range of Earnings (Cents)		Per Cent of Women Earning —		
			Lowest	Highest	Less than 25 cents	Less than 30 cents	40 cents and more
All occupations — paper box factories							
1	21	36.2	24.3	66.0	4.8	14.3	28.6
2	20	41.3	32.5	57.5	.....	.....	75.0
3	9	50.0	40.0	51.4	.....	.....	100.0
4	4	45.0	40.0	50.0	.....	.....	100.0
5	34	45.0	37.5	55.0	.....	.....	97.1
6	5	35.0	32.5	40.0	.....	.....	20.0
7	5	44.5	37.3	57.5	.....	.....	60.0
8	3	50.0	40.0	50.0	.....	.....	100.0
10	2	[2]	35.0	35.0	.....	.....	.....
11	7	50.0	40.0	50.0	.....	.....	100.0
12	7	49.9	40.0	50.0	.....	.....	100.0
13	6	49.7	40.0	52.3	.....	.....	100.0
14	15	50.0	40.0	62.5	.....	.....	100.0
15	5	50.2	40.0	66.5	.....	.....	100.0
16	4	50.0	40.0	50.0	.....	.....	100.0
17	4	40.0	35.0	50.0	.....	.....	50.0
18	8	55.0	40.0	55.0	.....	.....	100.0
19	10	32.5	25.0	45.0	.....	20.0	30.0
20	13	32.5	32.4	40.0	.....	.....	30.8
21	23	40.0	32.5	57.5	.....	.....	52.2
22	23	40.0	32.5	50.0	.....	.....	52.2
23	16	36.3	30.0	52.5	.....	.....	43.8
24	101	35.0	32.4	55.0	.....	.....	36.6
25	3	32.5	30.0	37.6	.....	.....	.....
26	47	46.9	33.2	83.9	.....	.....	57.4
27	24	35.1	32.0	54.4	.....	.....	45.8
28	10	40.0	32.5	42.5	.....	.....	60.0
29	46	33.3	22.2	53.3	4.3	26.1	26.1
30	11	40.0	32.5	50.0	.....	.....	54.5
Strippers — paper box factories							
1	4	38.6	36.2	43.7	.....	.....	25.0
2	4	50.0	50.0	50.0	.....	.....	100.0
3	2	[2]	50.0	51.4	.....	.....	100.0
4	2	[2]	50.0	50.0	.....	.....	100.0
5	13	50.0	45.0	55.0	.....	.....	100.0
6	1	[2]	35.0	35.0	.....	.....	.....
7	2	[2]	45.0	57.5	.....	.....	100.0
8	2	[2]	50.0	50.0	.....	.....	100.0
11	4	50.0	50.0	50.0	.....	.....	100.0
12	4	50.0	49.9	50.0	.....	.....	100.0
13	2	[2]	49.7	49.7	.....	.....	100.0
14	8	52.5	50.0	62.5	.....	.....	100.0
15	2	[2]	50.2	51.2	.....	.....	100.0
16	2	[2]	50.0	50.0	.....	.....	100.0
17	1	[2]	50.0	50.0	.....	.....	100.0
18	2	[2]	50.0	50.0	.....	.....	100.0
19	3	40.0	39.8	45.0	.....	.....	66.7
20	3	35.0	32.5	40.0	.....	.....	33.3
21	5	42.5	40.0	57.5	.....	.....	100.0
22	5	45.0	42.5	50.0	.....	.....	100.0
23	2	[2]	40.0	47.5	.....	.....	100.0
24	1	[2]	42.5	42.5	.....	.....	100.0
25	1	[2]	37.6	37.6	.....	.....	.....
26	25	45.7	33.2	83.9	.....	.....	56.0
27	4	52.6	50.1	54.4	.....	.....	100.0
28	4	42.5	40.0	42.5	.....	.....	100.0
29	3	37.6	36.5	39.6	.....	.....	.....
30	4	43.8	40.0	45.0	.....	.....	100.0

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[1] New York State Department of Labor, Division of Women in Industry and Minimum Wage, *Wages of Women in Six Industries, New York State, 1935*, unpublished report, 1935.

[2] Not computed owing to small number involved.

Table VII—Plant by Plant Comparison of Hourly Earnings of Women in Six Industries, New York City, 1935[1]—*Continued*

Plant Number	Number of women	Median earnings (cents)	Range of Earnings (Cents)		Per Cent of Women Earning —		
			Lowest	Highest	Less than 25 cents	Less than 30 cents	40 cents and more
All occupations — cotton garment factories							
2	8	37.5	32.5	50.0	.....	.....	37.5
3	1	[2]	62.9	62.9	.....	.....	100.0
4	15	46.5	30.9	68.9	.....	.....	66.7
5	2	[2]	45.3	74.7	.....	.....	100.0
6	7	32.5	27.5	38.9	.....	28.6	.....
9	9	37.1	34.7	64.0	.....	.....	44.4
10	46	54.0	37.3	66.7	.....	.....	93.5
11	42	40.0	31.9	150.0	.....	.....	52.4
12	11	39.7	39.4	42.4	.....	.....	36.4
13	16	44.2	37.3	57.7	.....	.....	68.8
14	3	33.4	32.5	75.0	.....	.....	33.3
15	3	44.4	38.9	55.6	.....	.....	66.7
16	10	78.0	57.1	107.8	.....	.....	100.0
17	59	90.6	39.3	148.4	.....	.....	98.3
18	12	51.6	40.0	56.0	.....	.....	100.0
19	6	43.8	32.5	50.0	.....	.....	50.0
20	18	37.1	18.8	64.4	5.6	16.7	27.8
22	3	31.0	28.5	31.7	.....	33.3	.....
23	8	32.7	32.4	45.0	.....	.....	25.0
24	13	44.7	30.7	76.6	.....	.....	76.9
25	5	52.2	40.0	60.7	.....	.....	100.0
26	7	61.3	34.6	77.3	.....	.....	85.7
27	20	32.7	32.3	42.6	.....	.....	5.0
28	49	45.3	32.6	64.0	.....	.....	75.5
29	9	32.9	23.5	58.8	11.1	22.2	11.1
31	8	47.8	39.5	80.2	.....	.....	87.5
32	20	39.5	35.3	80.5	.....	.....	45.0
33	5	40.9	29.5	54.5	.....	20.0	80.0
34	30	42.7	34.7	125.0	.....	.....	83.3
35	14	44.0	37.8	101.0	.....	.....	92.9
36	19	55.1	40.0	83.1	.....	.....	100.0
37	17	41.7	25.0	58.0	.....	23.5	58.8
39	3	35.0	26.2	39.0	.....	33.3	.....
40	12	42.6	34.3	75.0	.....	.....	58.3
41	4	32.5	27.1	35.0	.....	25.0	.....
42	33	32.5	32.5	60.0	.....	.....	24.2
43	56	42.7	32.8	53.3	.....	.....	69.6
44	24	34.7	34.5	80.0	.....	.....	8.3
45	17	35.0	25.0	37.5	.....	11.8	.....
46	11	32.8	27.8	47.9	.....	36.4	27.3
47	2	[2]	42.9	64.3	.....	.....	100.0
48	7	32.5	32.1	44.3	.....	.....	14.3
49	48	36.1	25.0	47.2	.....	10.4	25.0
50	202	32.5	32.0	88.3	.....	.....	7.4
51	2	[2]	34.4	42.0	.....	.....	50.0
52	19	35.0	20.0	47.6	5.3	15.8	21.1

[1] New York State Department of Labor, Division of Women in Industry and Minimum Wage, *Wages of Women in Six Industries, New York State, 1935*, unpublished report, 1935.

[2] Not computed owing to small number involved.

Table VII—Plant by Plant Comparison of Hourly Earnings of Women in Six Industries, New York City, 1935[1]—*Continued*

Plant Number	Number of women	Median earnings (cents)	Range of Earnings (Cents)		Per Cent of Women Earning —		
			Lowest	Highest	Less than 25 cents	Less than 30 cents	40 cents and more
Operators — cotton garment factories							
2	6	41.0	32.5	50.0	.....	.....	50.0
4	10	44.7	30.9	52.0	.....	.....	70.0
6	7	32.5	27.5	38.9	.....	28.6	.....
10	30	54.7	48.0	64.0	.....	.....	100.0
11	18	38.8	32.5	72.3	.....	.....	55.6
12	10	39.7	39.4	42.4	.....	.....	40.0
16	5	99.7	90.3	107.8	.....	.....	100.0
17	30	98.8	90.0	148.4	.....	.....	100.0
18	7	52.5	40.3	54.7	.....	.....	100.0
20	9	40.2	26.5	64.4	.....	11.1	55.6
23	7	32.7	32.4	45.0	.....	.....	28.6
24	9	53.3	30.7	76.6	.....	.....	88.9
25	2	[2]	59.7	60.7	.....	.....	100.0
26	4	61.3	61.3	77.3	.....	.....	100.0
27	18	32.7	32.5	42.6	.....	.....	5.6
28	30	45.3	37.2	64.0	.....	.....	90.0
29	7	32.9	23.5	39.0	14.3	28.6	.....
31	4	53.6	42.2	60.3	.....	.....	100.0
32	18	40.8	35.3	80.5	.....	.....	50.0
33	2	[2]	54.5	54.5	.....	.....	100.0
34	20	42.7	38.1	60.2	.....	.....	95.0
35	5	60.1	59.7	101.0	.....	.....	100.0
36	12	58.8	53.5	83.1	.....	.....	100.0
37	11	44.1	27.8	58.0	.....	9.1	90.9
40	2	[2]	50.0	75.0	.....	.....	100.0
41	2	[2]	32.5	35.0	.....	.....	.....
42	25	35.0	32.5	60.0	.....	.....	32.0
43	43	42.7	32.8	53.3	.....	.....	83.7
45	11	35.0	30.0	37.5	.....	.....	.....
46	7	37.7	28.6	47.9	.....	14.3	42.9
48	1	[2]	44.3	44.3	.....	.....	100.0
49	38	37.5	25.0	47.2	.....	7.9	29.0
50	108	32.5	23.4	88.3	1.2	9.3	8.3
51	2	[2]	34.4	42.0	.....	.....	50.0
52	11	35.1	25.1	47.6	.....	9.1	36.4

[1] New York State Department of Labor, Division of Women in Industry and Minimum Wage, *Wages of Women in Six Industries, New York State, 1935*, unpublished report, 1935.

[2] Not computed owing to small number involved.

Table VII—Plant by Plant Comparison of Hourly Earnings of Women in Six Industries, New York City, 1935[1]—*Continued*

Plant Number	Number of women	Median earnings (cents)	Range of Earnings (Cents)		Per Cent of Women Earning —		
			Lowest	Highest	Less than 25 cents	Less than 30 cents	40 cents and more
797							
All occupations — knit goods factories							
2	17	50.0	35.2	90.1	.....	.....	76.5
3	14	37.5	35.0	100.0	.....	.....	42.9
4	8	50.0	45.8	60.0	.....	.....	100.0
5	4	41.3	37.5	48.9	.....	.....	50.0
6	19	62.0	48.6	85.7	.....	.....	100.0
7	2	[2]	35.0	37.5	.....	.....	.....
8	10	52.0	39.5	80.0	.....	.....	90.0
9	104	43.8	35.0	87.5	.....	.....	71.2
10	14	73.1	52.5	222.2	.....	.....	100.0
11	1	[2]	50.0	50.0	.....	.....	100.0
12	9	63.0	57.2	85.6	.....	.....	100.0
13	4	39.6	37.5	41.1	.....	.....	50.0
798 14	36	37.5	25.0	72.0	.....	11.1	41.7
15	12	45.7	35.0	71.6	.....	.....	66.7
16	15	39.1	31.9	96.4	.....	.....	33.3
17	4	43.8	40.0	65.0	.....	.....	100.0
18	71	54.9	41.0	171.3	.....	.....	100.0
19	3	57.2	51.4	88.6	.....	.....	100.0
20	38	50.9	39.6	82.0	.....	.....	97.4
21	1	[2]	50.0	50.0	.....	.....	100.0
22	6	62.5	62.5	70.0	.....	.....	100.0
23	8	61.0	55.5	75.0	.....	.....	100.0
24	23	36.0	35.0	55.0	.....	.....	34.8
25	18	38.8	35.0	57.5	.....	.....	50.0
26	2	[2]	55.2	56.7	.....	.....	100.0
27	4	85.6	40.0	85.7	.....	.....	100.0
28	7	61.0	40.0	83.0	.....	.....	100.0
799 29	16	83.3	55.5	97.3	.....	.....	100.0
30	2	[2]	51.5	54.3	.....	.....	100.0
31	54	58.3	46.7	96.0	.....	.....	100.0
32	8	54.3	34.3	71.4	.....	.....	87.5
33	15	56.0	42.0	80.3	.....	.....	100.0
34	93	45.0	30.0	99.1	.....	.....	74.2
35	13	41.3	38.5	52.5	.....	.....	92.3
36	26	57.0	47.1	97.2	.....	.....	100.0
37	2	[2]	35.0	42.5	.....	.....	50.0
38	13	35.1	25.1	37.5	.....	15.4	.....
39	15	38.8	35.0	67.5	.....	.....	46.7
40	152	49.3	34.9	94.6	.....	.....	75.7
41	12	33.5	20.0	57.4	25.0	33.3	33.3
42	1	[2]	33.0	33.0	.....	.....	.....
43	9	42.2	42.0	97.4	.....	.....	100.0
44	2	[2]	46.6	46.6	.....	.....	100.0
800 46	7	47.3	41.7	83.5	.....	.....	100.0
47	6	60.0	60.0	62.9	.....	.....	100.0
48	7	35.0	35.0	50.0	.....	.....	42.9

[1] New York State Department of Labor, Division of Women in Industry and Minimum Wage, *Wages of Women in Six Industries, New York State, 1935*, unpublished report, 1935.

[2] Not computed owing to small number involved.

Table VII—Plant by Plant Comparison of Hourly Earnings of Women in Six Industries, New York City, 1935[1]—*Continued*

Plant Number	Number of women	Median earnings (cents)	Range of Earnings (Cents)		Per Cent of Women Earning —		
			Lowest	Highest	Less than 25 cents	Less than 30 cents	40 cents and more
Finishers — knit goods factories							
2	6	42.5	35.2	62.5	.....	.....	66.7
3	3	35.0	35.0	37.5	.....	.....	.....
4	1	50.0	50.0	50.0	.....	.....	100.0
6	6	54.3	51.4	64.3	.....	.....	100.0
8	3	42.7	39.5	44.4	.....	.....	66.7
9	30	38.8	35.0	50.0	.....	.....	50.0
10	8	60.9	52.2	73.3	.....	.....	100.0
12	4	60.0	57.2	77.1	.....	.....	100.0
14	4	35.0	35.0	40.0	.....	.....	25.0
15	3	37.5	35.0	41.3	.....	.....	33.3
16	3	37.4	35.9	39.6	.....	.....	.....
17	2	[2]	40.0	45.0	.....	.....	100.0
18	25	44.4	41.0	50.0	.....	.....	100.0
19	2	[2]	51.4	57.2	.....	.....	100.0
20	14	49.0	39.6	58.0	.....	.....	92.9
22	1	[2]	62.5	62.5	.....	.....	100.0
23	5	61.0	57.9	61.0	.....	.....	100.0
24	5	35.0	35.0	42.5	.....	.....	20.0
25	6	35.4	35.0	40.0	.....	.....	16.7
28	3	61.0	53.1	61.0	.....	.....	100.0
29	3	61.1	55.5	75.0	.....	.....	100.0
30	1	[2]	54.3	54.3	.....	.....	100.0
31	28	52.8	52.6	69.5	.....	.....	100.0
32	2	[2]	34.3	40.0	.....	.....	50.0
33	3	52.8	46.9	52.9	.....	.....	100.0
34	13	45.0	37.8	60.5	.....	.....	92.3
35	5	41.3	41.2	50.0	.....	.....	100.0
38	3	35.1	35.0	35.1	.....	.....	.....
40	29	41.6	35.0	69.0	.....	.....	62.1
41	7	30.0	20.0	37.0	28.6	42.9	.....
42	1	[2]	33.0	33.0	.....	.....	.....
46	4	44.5	41.7	47.3	.....	.....	100.0
47	5	60.0	60.0	60.0	.....	.....	100.0
48	1	[2]	35.0	35.0	.....	.....	.....

[1] New York State Department of Labor, Division of Women in Industry and Minimum Wage, *Wages of Women in Six Industries, New York State, 1935*, unpublished report, 1935.

[2] Not computed owing to small number involved.

Table VII—Plant by Plant Comparison of Hourly Earnings of Women in Six Industries, New York City, 1935[1]—*Continued*

806

Plant Number	Number of women	Median earnings (cents)	Range of Earnings (Cents)		Per Cent of Women Earning —		
			Lowest	Highest	Less than 25 cents	Less than 30 cents	40 cents and more
807 All occupations — handbag factories							
1	2	[2]	51.6	55.0	.....	.....	100.0
2	1	[2]	37.3	37.3	.....	.....	.....
3	3	42.7	36.7	42.7	.....	.....	66.7
4	6	49.3	36.9	68.0	.....	.....	83.3
5	12	54.7	29.2	100.0	.....	8.3	66.7
6	10	40.4	37.3	85.3	.....	.....	90.0
7	2	[2]	58.7	75.0	.....	.....	100.0
8	13	35.1	35.0	40.0	.....	.....	7.7
9	3	53.3	42.7	74.7	.....	.....	100.0
11	4	32.0	30.0	34.7	.....	.....	.....
12	1	[2]	50.0	50.0	.....	.....	100.0
13	5	50.7	35.0	53.3	.....	.....	80.0
14	1	[2]	70.0	70.0	.....	.....	100.0
15	2	[2]	40.0	40.0	.....	.....	100.0
16	48	39.2	34.8	87.5	.....	.....	35.4
808 17	41	37.3	32.0	88.0	.....	.....	31.7
18	2	[2]	42.6	65.3	.....	.....	100.0
19	8	44.0	37.3	56.0	.....	.....	62.5
20	2	[2]	37.5	79.6	.....	.....	50.0
21	1	[2]	43.7	43.7	.....	.....	100.0
22	8	66.0	17.9	90.4	.....	.....	87.5
23	8	39.8	37.1	61.1	.....	.....	37.5
24	4	37.4	37.4	55.0	.....	.....	25.0
25	5	70.0	53.3	89.6	.....	.....	100.0
26	15	56.0	39.2	89.6	.....	.....	86.7
27	8	64.4	37.3	95.3	.....	.....	87.5
28	1	[2]	52.3	52.3	.....	.....	100.0
29	4	42.5	40.0	48.0	.....	.....	100.0
30	2	[2]	40.0	50.5	.....	.....	100.0
31	3	61.3	48.0	67.2	.....	.....	100.0
809 32	4	35.0	35.0	57.5	.....	.....	25.0
33	3	35.4	35.1	35.4	.....	.....	.....
34	1	[2]	35.0	35.0	.....	.....	.....
35	6	35.0	35.0	40.8	.....	.....	16.7
Operators — handbag factories							
1	1	[2]	55.0	55.0	.....	.....	100.0
5	3	89.6	85.3	100.0	.....	.....	100.0
6	3	66.7	64.7	85.3	.....	.....	100.0
7	1	[2]	75.0	75.0	.....	.....	100.0
9	1	[2]	74.7	74.7	.....	.....	100.0
16	1	[2]	42.4	42.4	.....	.....	100.0
17	3	74.7	74.7	88.0	.....	.....	100.0
19	4	50.7	48.0	56.0	.....	.....	100.0
20	2	[2]	37.5	79.6	.....	.....	50.0
810 22	4	77.7	67.0	90.4	.....	.....	100.0
23	2	[2]	37.4	42.9	.....	.....	50.0
25	2	[2]	89.6	89.6	.....	.....	100.0
26	4	89.6	89.6	89.6	.....	.....	100.0
27	3	85.3	85.3	95.3	.....	.....	100.0
29	1	[2]	48.0	48.0	.....	.....	100.0
30	1	[2]	50.5	50.5	.....	.....	100.0
31	1	[2]	67.2	67.2	.....	.....	100.0
32	1	[2]	57.5	57.5	.....	.....	100.0
35	1	[2]	40.8	40.8	.....	.....	100.0

[1] New York State Department of Labor, Division of Women in Industry and Minimum Wage, *Wages of Women in Six Industries, New York State, 1935*, unpublished report, 1935.

[2] Not computed owing to small number involved.

Table VII—Plant by Plant Comparison of Hourly Earnings of Women in Six Industries, New York City, 1935[1]—*Continued*

Plant Number	Number of women	Median earnings (cents)	Range of Earnings (Cents)		Per Cent of Women Earning—		
			Lowest	Highest	Less than 25 cents	Less than 30 cents	40 cents and more
All occupations — retail stores							
3	2	[2]	31.3	31.3	.....	.....	.....
6	1	[2]	35.4	35.4	.....	.....	.....
7	1	[2]	37.5	37.5	.....	.....	.....
9	1	[2]	41.7	41.7	.....	.....	100.0
14	3	31.3	31.3	37.5	.....	.....	.....
15	18	41.4	31.3	59.5	.....	.....	50.0
19	1	[2]	31.3	31.3	.....	.....	.....
20	2	[2]	41.7	41.7	.....	.....	100.0
21	8	52.6	50.0	73.1	.....	.....	100.0
22	8	59.8	40.0	87.5	.....	.....	100.0
23	7	53.8	50.0	87.5	.....	.....	100.0
29	10	38.6	12.5	56.3	10.0	30.0	50.0
30	2	[2]	31.3	48.9	.....	.....	50.0
31	93	32.9	22.4	50.0	18.3	20.4	2.2
32	2	[2]	31.3	41.7	.....	.....	50.0
33	4	45.8	37.5	52.1	.....	.....	75.0
35	5	41.7	33.3	45.8	.....	.....	80.0
36	1	[2]	29.2	29.2	.....	100.0	.....
37	3	41.7	33.0	41.7	.....	.....	66.7
38	4	37.5	25.0	47.9	.....	25.0	50.0
39	1	[2]	25.0	25.0	.....	100.0	.....
40	5	31.3	30.3	36.4	.....	.....	.....
41	8	41.7	36.5	52.1	.....	.....	62.5
42	1	[2]	41.7	41.7	.....	.....	100.0
43	1	[2]	33.3	33.3	.....	.....	.....
44	3	20.8	20.8	25.0	66.7	100.0	.....
45	1	[2]	33.3	33.3	.....	.....	.....
47	1	[2]	31.3	31.3	.....	.....	.....
48	2	[2]	37.5	37.5	.....	.....	100.0
49	5	47.8	43.5	54.3	.....	.....	.....
50	5	31.3	30.9	31.3	.....	.....	.....
51	1	[2]	31.3	31.3	.....	.....	.....
52	2	[2]	31.3	37.5	.....	.....	.....
53	1	[2]	31.3	31.3	.....	.....	.....
54	47	31.3	29.1	31.3	.....	31.9	.....
55	4	34.7	31.3	41.7	.....	.....	25.0
56	4	43.8	41.7	52.1	.....	.....	100.0
60	3	35.0	33.3	37.5	.....	.....	.....
61	1	[2]	35.0	35.0	.....	.....	.....
68	46	33.0	30.2	40.9	.....	.....	2.2
69	1	[2]	31.3	31.3	.....	.....	.....
70	1	[2]	39.0	39.0	.....	.....	.....
71	2	[2]	20.8	25.0	50.0	100.0	.....
72	2	[2]	30.0	37.5	.....	.....	.....
73	1	[2]	45.8	45.8	.....	.....	100.0
74	1	[2]	35.7	35.7	.....	.....	.....
75	1	[2]	62.5	62.5	.....	.....	100.0
76	2	[2]	31.3	31.3	.....	.....	.....
77	7	31.3	31.3	39.6	.....	.....	.....

[1] New York State Department of Labor, Division of Women in Industry and Minimum Wages, *Wages of Women in Six Industries, New York, State, 1935*, unpublished report, 1935.

[2] Not computed owing to small number involved.

816 Table VII—Plant by Plant Comparison of Hourly Earnings of Women in Six Industries, New York City, 1935[1]—*Concluded*

	Plant Number	Number of women	Median earnings (cents)	Range of Earnings (Cents)		Per Cent of Women Earning —		
				Lowest	Highest	Less than 25 cents	Less than 30 cents	40 cents and more
817	Saleswomen — retail stores							
	3	2	[2]	31.3	31.3	.....	.....	.....
	6	1	[2]	35.4	35.4	.....	.....	.....
	7	1	[2]	37.5	37.5	.....	.....	.....
	9	1	[2]	41.7	41.7	.....	.....	100.0
	14	3	31.3	31.3	37.5	.....	.....	.....
	15	13	31.3	31.3	59.5	.....	.....	38.5
	19	1	[2]	31.3	31.3	.....	.....	.....
	20	2	[2]	41.7	41.7	.....	.....	100.0
	21	6	56.6	50.0	73.1	.....	.....	100.0
	22	6	59.8	57.1	72.1	.....	.....	100.0
	23	6	51.9	50.0	75.9	.....	.....	100.0
	29	10	38.6	12.5	56.3	10.0	30.0	50.0
818	30	1	[2]	31.3	31.3	.....	.....	.....
	31	63	32.9	30.7	40.0	.....	.....	1.6
	32	2	[2]	31.3	41.7	.....	.....	50.0
	33	4	45.8	37.5	52.1	.....	.....	75.0
	35	5	41.7	33.3	45.8	.....	.....	80.0
	36	1	[2]	29.2	29.2	.....	100.0	.....
	37	2	[2]	33.0	41.7	.....	.....	50.0
	38	4	37.5	25.0	47.9	.....	25.0	50.0
	39	1	[2]	25.0	25.0	.....	100.0	.....
	40	5	31.3	30.3	36.4	.....	.....	.....
	41	8	41.7	36.5	52.1	.....	.....	62.5
	42	1	[2]	41.7	41.7	.....	.....	100.0
	43	1	[2]	33.3	33.3	.....	.....	.....
	44	3	20.8	20.8	25.0	66.7	100.0	.....
	45	1	[2]	33.3	33.3	.....	.....	.....
	47	1	[2]	31.3	31.3	.....	.....	.....
819	48	2	[2]	37.5	37.5	.....	.....	.....
	49	5	47.8	43.5	54.3	.....	.....	100.0
	50	5	31.3	30.9	31.3	.....	.....	.....
	51	1	[2]	31.3	31.3	.....	.....	.....
	52	2	[2]	31.3	37.5	.....	.....	.....
	53	1	[2]	31.3	31.3	.....	.....	.....
	54	33	31.3	29.1	31.3	.....	18.2	.....
	55	2	[2]	31.3	36.1	.....	.....	.....
	56	4	43.8	41.7	52.1	.....	.....	100.0
	60	1	[2]	35.0	35.0	.....	.....	.....
	61	1	[2]	35.0	35.0	.....	.....	.....
	68	36	33.0	30.6	33.0	.....	.....	.....
	69	1	[2]	31.3	31.3	.....	.....	.....
	70	1	[2]	39.0	39.0	.....	.....	.....
	71	2	[2]	20.8	25.0	50.0	100.0	.....
	72	1	[2]	30.0	30.0	.....	.....	.....
820	73	1	[2]	45.8	45.8	.....	.....	100.0
	74	1	[2]	35.7	35.7	.....	.....	.....
	75	1	[2]	62.5	62.5	.....	.....	100.0
	76	2	[2]	31.3	31.3	.....	.....	.....
	77	7	31.3	31.3	39.6	.....	.....	.....

[1] New York State Department of Labor, Division of Women in Industry and Minimum Wage, *Wages of Women in Six Industries, New York State, 1935*, unpublished report, 1935.

[2] Not computed owing to small number involved.

Table VIII—Hourly Earnings of Women in Six Industries in New York City, 1935[1]

Hourly Earnings	Number of Women											
	Candy		Cotton Garment		Handbag		Knit Goods		Paper Box		Retail Stores	
	All occupations	Packer	All occupations	Operator	All occupations	Operator	All occupations	Finisher	All occupations	Stripper	All occupations	Saleswoman
Total reporting	932	507	935	531	239	39	901	239	486	115	336	265
Median earnings (cents)	29.8	29.8	38.5	40.7	40.3	72.5	50.3	44.4	40.3	49.9	32.7	32.8
Under 25 cents	7	1	5	2	1	.....	3	2	3	.....	21	4
25 and under 26 cents	1	.....	8	3	.....	.....	6	1	3	.....	7	5
26 and under 27 cents	3	.....	3	1	.....	.....	1	.....	1	.....	.....	.....
27 and under 28 cents	4	2	13	8	.....	.....	.....	.....	.....	.....	.....	.....
28 and under 29 cents	5	2	7	4	.....	.....	.....	.....	10	.....	.....	.....
29 and under 30 cents	526	319	4	3	1	.....	.....	.....	.....	.....	17	8
30 and under 31 cents	16	13	9	5	1	.....	5	1	2	.....	13	9
31 and under 32 cents	41	32	7	2	.....	.....	2	.....	9	.....	69	61
32 and under 33 cents	13	8	219	113	3	.....	1	1	64	1	58	54
33 and under 34 cents	12	4	8	3	.....	.....	1	1	20	9	53	43
34 and under 35 cents	42	30	51	5	2	.....	2	1	.....	.....	1	.....
35 and under 36 cents	98	38	37	27	39	.....	97	33	71	3	5	5
36 and under 37 cents	8	8	31	23	2	.....	10	1	2	2	4	4
37 and under 38 cents	10	5	55	26	43	2	56	18	29	3	10	9
38 and under 39 cents	4	3	21	14	8	.....	12	2	3	2	1	.....
39 and under 40 cents	7	6	23	11	13	.....	11	3	4	2	3	3
40 and under 45 cents	69	31	156	101	43	3	135	65	113	18	27	21
45 and under 50 cents	14	3	62	37	12	3	85	18	50	18	15	13
50 and under 55 cents	9	.....	58	41	12	2	120	47	74	42	15	11
55 and under 60 cents	9	.....	46	33	10	3	87	13	17	7	7	7
60 cents and over	34	2	112	69	49	26	257	32	11	8	10	8

[1] New York State Department of Labor, Division of Women in Industry and Minimum Wage, *Wages of Women in Six Industries, New York State, 1935*, unpublished report, 1935.

825 824 823 822 821

167

826 Table IX—Average Hourly Earnings of Men and Women in Selected Industries in New York State, 1929–1932[1]

Industry, Occupation, and Date	Number of Employees		Average Hourly Earnings		Ratio of women's earnings to men's
	Male	Female	Male (cents)	Female (cents)	
827					
Furniture — 1929					
Sanders — hand	374	39	48.8	38.7	79.3
Upholsterers	410	16	83.0	41.8	50.4
Cotton goods — 1930					
Speeder tenders	47	182	45.6	39.9	87.5
Spinners, frame	20	250	52.0	41.6	80.0
Weavers	167	150	55.4	52.7	95.1
Silk and rayon — 1931					
Spinners	202	415	40.6	33.3	82.0
Warpers	125	58	70.1	55.1	78.6
Twisters, in hand	36	13	61.8	46.5	75.2
Weavers, broad silk	796	528	49.6	42.8	86.3
Boot and shoe — 1932					
Skivers, upper	10	98	77.0	39.0	50.6
828 Cementers and doublers, hand and machine	17		7.6	26.9	56.5
Folders, hand and machine	70	4	69.9	33.2	47.4
Perforators	42	68	50.8	36.9	72.6
Top stitchers	33	241	65.7	37.3	56.8
Binders	13	98	71.0	48.1	67.7
Eyeletters	16	13	57.3	38.5	67.2
Vampers	35	201	64.9	37.6	57.9
Fancy stitchers	74	559	71.5	32.6	45.6
Assemblers for pulling over machine	75	12	55.4	32.4	58.4
Sole cementers	30	18	40.4	28.0	69.3
Bottom stainers	35	67	39.8	27.9	70.1
Shoe cleaners	43	19	32.9	25.1	76.3
Treers, hand and machine	161	47	41.9	30.1	71.8
Repairers (not cobblers)	19	71	67.3	35.7	53.0
829 Channel openers and closers	48	19	33.7	41.6	123.4
Packers	11	34	53.6	34.0	63.4
Hosiery and underwear — 1932					
Knitters, web or tube	118	12	43.8	30.9	70.5
Pressers	40	44	40.3	19.2	47.6
Woolen and worsted goods — 1932					
Weavers	93	153	45.7	43.1	94.3

[1] Compiled from United States Department of Labor, Bureau of Labor Statistics:

Wages and Hours of Labor in the Furniture Industry, 1910 to 1929, Bulletin No. 526, 1931, pp. 31–35;

Wages and Hours of Labor in Cotton-Goods Manufacturing, 1910 to 1930, Bulletin No. 539, 1931, pp. 29–36;

830 *Wages and Hours of Labor in the Manufacture of Silk and Rayon Goods: 1931*, Bulletin No. 568, 1932, pp. 28–36;

Wages and Hours of Labor in the Boot and Shoe Industry, 1910 to 1932, Bulletin No. 579, 1933, pp. 49–78;

Wages and Hours of Labor in the Hosiery and Underwear Industries, 1932, Bulletin No. 591, 1933, pp. 39–70;

Wages and Hours of Labor in Woolen and Worsted Goods Manufacturing, 1932, Bulletin No. 584, 1933, pp. 33–42.

Week's Earnings	All industries	Number of women					
		Candy	Cotton garment	Handbag	Knit goods	Paper box	Retail stores
New York State							
Total	7,368	1,334	1,849	629	1,312	1,312	932
Median earnings	$13.65	$13.15	$13.36	$14.07	$14.65	$13.98	$13.69
Per cent with earnings under $5	7.7	6.1	5.8	10.3	10.3	1.8	16.5
Per cent with earnings under 10	24.6	30.1	26.1	28.5	22.4	15.5	27.4
Per cent with earnings under 12	34.3	39.4	37.2	35.8	30.8	24.0	40.1
Per cent with earnings under 15	68.1	80.3	67.6	73.5	54.5	65.9	68.6
Under $1	20	2	1	4	4	.....	9
$1 and under $2	77	15	7	6	23	.....	26
2 and under 3	202	20	35	18	32	8	89
3 and under 4	129	26	28	11	42	3	19
4 and under 5	139	18	37	26	34	13	11
5 and under 6	243	113	57	21	22	15	15
6 and under 7	178	33	53	22	30	20	20
7 and under 8	252	53	73	21	29	58	18
8 and under 9	308	83	90	29	40	39	27
9 and under 10	268	38	102	21	38	48	21
10 and under 11	351	56	95	29	61	47	63
11 and under 12	363	68	109	17	49	64	56
12 and under 13	501	91	143	26	78	114	49
13 and under 14	1,009	336	266	51	63	231	62
14 and under 15	980	119	153	179	170	205	154
15 and under 16	617	56	148	56	111	140	106
16 and under 17	426	74	121	20	82	105	24
17 and under 18	212	18	61	8	47	68	10
18 and under 19	224	27	48	11	49	48	41
19 and under 20	135	20	34	6	39	25	11
20 and under 21	168	14	38	7	41	30	38
21 and under 23	164	9	38	8	66	17	26
23 and under 25	107	11	31	12	35	8	10
25 and under 30	185	29	42	13	80	3	18
30 and under 35	51	2	16	5	24	2	2
35 and over	59	3	23	2	23	1	7

[1] New York State Department of Labor, Division of Women in Industry and Minimum Wage, *Wages of Women in Six Industries, New York State, 1935*, unpublished report, 1935.

Table X—Week's Earnings of Women in Six Industries, 1935[1]—*Continued*

Week's Earnings	All industries	Number of Women					
		Candy	Cotton garment	Handbag	Knit goods	Paper box	Retail stores
New York City							
Total	4,486	986	1,324	253	992	498	433
Median earnings	$13.68	$13.18	$13.31	$14.18	$15.29	$13.57	$15.03
Per cent with earnings under $5	7.2	4.7	7.3	8.7	11.4	3.0	6.7
Per cent with earnings under 10	25.3	27.8	28.4	30.8	23.5	24.3	12.5
Per cent with earnings under 12	34.3	36.9	38.5	37.2	30.0	36.3	21.0
Per cent with earnings under 15	64.1	84.7	65.0	65.2	47.9	65.5	49.4
Under $1	5	1	1	.....	3	.....	.....
$1 and under $2	35	9	7	1	17	.....	1
2 and under 3	90	8	27	6	27	2	20
3 and under 4	90	19	26	1	37	2	5
4 and under 5	101	9	35	14	29	11	3
5 and under 6	176	92	48	8	15	8	5
6 and under 7	107	13	39	13	24	15	3
7 and under 8	168	44	60	12	21	28	3
8 and under 9	208	68	63	16	33	21	7
9 and under 10	156	11	70	7	27	34	7
10 and under 11	195	39	60	8	38	34	16
11 and under 12	207	51	74	8	27	26	21
12 and under 13	316	74	106	9	56	40	31
13 and under 14	574	314	149	15	38	49	9
14 and under 15	447	83	95	47	83	56	83
15 and under 16	337	27	104	28	72	28	78
16 and under 17	275	59	90	9	66	35	16
17 and under 18	128	5	37	7	40	32	7
18 and under 19	149	11	37	6	44	23	28
19 and under 20	82	.....	22	3	36	16	5
20 and under 21	129	7	33	4	36	17	32
21 and under 23	144	5	35	5	63	14	22
23 and under 25	93	7	27	11	34	5	9
25 and under 30	175	27	41	10	79	1	17
30 and under 35	46	1	15	4	24	1	1
35 and over	53	2	23	1	23	.....	4

Week's Earnings	All industries	Number of women					
		Candy	Cotton garment	Handbag	Knit goods	Paper box	Retail stores
Outside New York City							
Total	2,882	348	525	376	320	814	499
Median earnings	$13.61	$12.76	$13.41	$14.03	$14.08	$14.11	$11.04
Per cent with earnings under $5	8.5	10.1	2.3	11.4	6.9	1.1	25.1
Per cent with earnings under 10	23.6	36.5	20.4	26.9	19.1	10.2	40.3
Per cent with earnings under 12	34.4	46.3	33.7	34.8	33.1	16.5	56.7
Per cent with earnings under 15	74.4	67.8	74.1	84.0	75.0	66.2	85.2
Under $1	15	1	.....	4	1	.....	9
$1 and under $2	42	6	.....	5	6	.....	25
2 and under 3	112	12	8	12	5	6	69
3 and under 4	39	7	2	10	5	1	14
4 and under 5	38	9	2	12	5	2	8
5 and under 6	67	21	9	13	7	7	10
6 and under 7	71	20	14	9	6	5	17
7 and under 8	84	9	13	9	8	30	15
8 and under 9	100	15	27	13	7	18	20
9 and under 10	112	27	32	14	11	14	14
10 and under 11	156	17	35	21	23	13	47
11 and under 12	156	17	35	9	22	38	35
12 and under 13	185	17	37	17	22	74	18
13 and under 14	435	22	117	36	25	182	53
14 and under 15	533	36	58	132	87	149	71
15 and under 16	280	29	44	28	39	112	28
16 and under 17	151	15	31	11	16	70	8
17 and under 18	84	13	24	1	7	36	3
18 and under 19	75	16	11	5	5	25	13
19 and under 20	53	20	12	3	3	9	6
20 and under 21	39	7	5	3	5	13	6
21 and under 23	20	4	3	3	3	3	4
23 and under 25	14	4	4	1	1	3	1
25 and under 30	10	2	1	3	1	2	1
30 and under 35	5	1	1	1	.....	1	1
35 and over	6	1	.....	1	.....	1	3

[1] New York State Department of Labor, Division of Women in Industry and Minimum Wage, *Wages of Women in Six Industries New York State, 1935*, unpublished report, 1935.

Table XI—Week's Earnings of Women Employed in Various Industries in New York State, Compiled from Special Studies, 1913–1934

Industry	Date of study	Total number of women reporting	Per Cent of Women Whose Week's Earnings Were —				Source
			Under $5	Under $10	Under $12	Under $15	
Hotel	1934	2,880	13.6	50.5	68.8	88.3	N. Y. Department of Labor, Report to Hotel and Restaurant Wage Board, pp. 113, 116, 119.
Restaurant	1934	8,875	23.7	61.7	74.3	87.3	*Ibid.*, p. 90.
Laundry	1933	5,322	5.0	44.3	69.0	90.9	N. Y. Department of Labor, Report to Laundry Wage Board, Appendix, Table I.
	[1] 1931	1,605	1.4	9.6	23.9	59.8	N. Y. Department of Labor, Division of Women in Industry, unpublished report, p. 12.
	[1] 1929	1,588	2.5	8.4	15.7	46.4	N. Y. Department of Labor, Bureau of Women in Industry, unpublished report, p. 12 A.
	1926	3,216	4.0	12.0	20.5	54.6	N. Y. Department of Labor, Bulletin No. 153, p. 54.
Glove	[2] 1933	622	5.6	26.5	[3]	69.0	U. S. Women's Bureau, Bulletin No. 119, p. 5.
Shirt	1933	5,310	[3]	64.0	81.0	94.0	U. S. Department of Labor, mimeo. report, p. 18.
	1923	14,008	3.6	18.7	31.0	50.9	N. Y. Department of Labor, Bulletin No. 121, p. 115.
	1918	14,164	7.5	38.3	57.7	78.2	*Ibid.*
	1913	8,773	24.1	83.1	92.2	98.2	*Ibid.*
All industries — Newburgh	1929	1,149	[3]	[3]	44.9	[3]	N. Y. Department of Labor, Bureau of Women in Industry, mimeo. report, p. 35.

[1] New York City only.
[2] Fulton County only.
[3] Not available.

Table XI—Week's Earnings of Women Employed in Various Industries in New York State, Compiled from Special Studies, 1913–1934—*Continued*

Industry	Date of study	Total number of women reporting	Per Cent of Women Whose Week's Earnings Were —				Source
			Under $5	Under $10	Under $12	Under $15	
Tobacco	1929	1,988	2.0	9.2	[3]	32.9	U. S. Women's Bureau, Bulletin No. 100, p. 166.
	1923	7,934	2.5	11.6	19.8	36.5	N. Y. Department of Labor, Bulletin No. 121, p. 116.
	1918	8,709	3.3	17.4	31.8	53.7	*Ibid.*
Paper box	[1] 1927	1,176	2.4	11.3	21.3	41.8	N. Y. Department of Labor, Bulletin No. 154, pp. 56–7.
	1923	4,324	3.3	15.6	29.5	56.8	N. Y. Department of Labor, Bulletin No. 121, p. 114.
	1918	4,513	5.5	35.8	59.2	82.9	*Ibid.*
	1913	6,909	18.9	85.9	95.8	99.5	*Ibid.*
All industries — Binghamton	1926	4,237	3.7	12.8	20.7	41.1	N. Y. Department of Labor, Bureau of Women in Industry, Special Bulletin, p. 82.
Knitted outerwear	[1] 1923	1,260	.....	0.3	2.9	10.5	N. Y. Department of Labor, Bulletin No. 117, p. 12.
Mercantile	1923	28,823	0.2	8.1	18.1	40.2	N. Y. Department of Labor, Bulletin No. 121, p. 111.
	1918	28,279	0.9	29.5	50.3	75.1	*Ibid.*
	1913	30,019	14.2	73.8	84.2	92.7	*Ibid.*
Candy	1923	3,971	4.0	18.4	35.4	63.0	*Ibid.*, p. 113.
	1918	5,495	13.3	51.4	72.3	89.0	*Ibid.*
	1913	5,129	28.3	92.5	97.9	99.4	*Ibid.*
5 and 10 cent stores	1921	1,551	5.4	19.5		70.1	N. Y. Department of Labor, Bulletin No. 109, p. 53.
Millinery	[1] 1914	1,869	14.4	52.6	67.2	84.8	N. Y. Factory Investigating Commission, 1915, Vol. II, pp. 396–7.
Button	[1] 1913	286	18.2	88.5	93.7	97.9	*Ibid.*, pp. 350–1.

[1] New York City only.
[2] Fulton County only.
[3] Not available.

Table XII—Average Weekly Earnings of Men and Women in Representative New York State Factories, 1923–1935[1]

Year	All Factories		Candy		Knit Goods — Except Silk		Paper Boxes and Tubes		Shoes		Women's Clothing	
	Men	Women	Men	Women	Men	Women	Men	Women	Men	Women	Men	Women
1923[2]	$31 43	$16 31	$25 17	$14 10	$26 76	$16 65	$26 65	$16 02	$27 61	$17 81	$40 34	$22 52
1924	31 01	16 65	25 63	14 60	26 50	15 34	27 53	16 54	26 68	16 55	43 18	23 63
1925	31 48	17 12	25 91	14 63	26 78	16 34	28 14	17 11	28 42	16 59	45 10	24 97
1926	32 72	18 08	27 17	15 61	27 29	15 93	30 91	17 35	29 8[illegible]	17 87	46 59	26 02
1927	33 20	18 62	28 20	15 83	28 13	16 41	31 21	17 0[illegible]	30 69	[illegible] 30	47 64	27 26
1928	33 47	18 49	28 21	16 45	26 81	15 62	31 51	17 [illegible]1	30 13	17 6[illegible]	49 18	27 35
1929	33 97	18 75	29 73	15 58	27 21	15 89	32 90	17 [illegible]2	30 63	18 29	49 01	27 92
1930	32 37	17 97	29 49	15 03	25 89	13 89	31 48	16 73	26 62	15 89	47 66	28 41
1931	29 56	16 60	26 38	13 86	24 17	12 63	29 77	14 83	23 09	13 13	43 28	25 03
1932	25 36	13 75	25 22	12 61	21 84	10 99	24 46	12 84	19 92	11 01	37 01	19 85
1933	24 27	13 35	22 42	11 51	20 81	11 63	22 46	12 51	19 43	11 36	33 51	18 39
1934	25 62	14 90	23 13	13 42	21 18	13 12	22 88	13 92	20 61	13 02	35 32	20 38
1935[3]	26 79	15 40	23 50	13 24	21 23	13 10	23 89	14 14	22 78	14 43	35 85	19 91

[1] Compiled from figures published monthly by the New York State Department of Labor, Division of Statistics and Information, in *The Industrial Bulletin*, 1923–1935.

[2] Includes the period from June to December; data not available prior to June, 1923.

[3] Includes the period from January to August.

Table XIII—Average Minimum Weekly Cost of Maintaining a Fair American Standard of Living for Single Workers in New York City, 1926, Reported by the National Industrial Conference Board, Inc.[1] 861

Industrial worker	*Weekly cost*
Single man, living apart from family group	$18.69
Single woman, living apart from family group	16.53[2]
Single woman, living as part of family group	12.80
Office worker	
Single man, living apart from family group	21.87
Single woman, living apart from family group	19.34

862

863

[1] National Industrial Conference Board, Inc., *The Cost of Living in New York City, 1926*, New York, 1926, pp. 126–127.

[2] The National Industrial Conference Board presented no data separately for a single woman industrial worker living apart from the family group. Since cost of living figures presented by other organizations are for a single woman living alone, this figure was calculated in order to make the National Industrial Conference Board budget comparable with the others. 864

This figure was derived from the budgets presented by the National Industrial Conference Board for other groups of single workers. It was obtained by calculating the percentage difference between the cost of living for a single man (living apart from the family group) employed as office worker and for a single man employed as an industrial worker. This percentage difference was then applied to the cost of living for a single woman office worker, living apart from the family group, in order to obtain the cost of living for a woman industrial worker, living apart from the family group. In this calculation, it is assumed that the difference in the cost of living for women office workers and women industrial workers would be the same as the difference in the cost of living for men in these two groups. 865

Table XIV—Average Minimum Weekly Cost of Maintaining a Fair American Standard of Living for a Single Woman in New York City, 1926 and 1935

	1926	*1935*
Index of cost of living[1]	181.9[2]	147.6[2]
Percentage decrease, 1926 to 1935	18.9	
Weekly cost[3]	$16.53	$13.41

[1] United States Department of Labor, Bureau of Labor Statistics, *Revised Indexes of the Cost of Goods Purchased by Wage Earners and Lower-Salaried Workers for 19 Cities* (in press). See also F. M. Williams, M. H. Hogg, and E. Clague, "Revision of Index of Cost of Goods Purchased by Wage Earners and Lower-Salaried Workers," *Monthly Labor Review*, September, 1935, pp. 819–837.

[2] December, 1914 = 100. Figures are for June 1926, and July 1935, respectively.

[3] Based on figures presented by the National Industrial Conference Board, Inc. See Appendix, Table XIII.

Table XV—Weekly Budget at a "Minimum-Self-Supporting Level" for a Single Woman, Reported by the Welfare Council of New York City for July, 1935[1]

Item	*Amount*
Total	$16.00
Food and shelter	11.25
Clothing	1.75
Carfare	.75
Health care	.50
Insurance and savings	.75
Other expenses	1.00

[1] Reported to the New York State Department of Labor, by letter, dated August 27, 1935.

Weekly Earnings	Total	Number of Women Employed in —				
		Manufacturing industries	Trade, wholesale and retail	Service industries	Clerical occupations	All other industries or occupations
Total	4,254	1,853	406	1,343	541	111
Total reporting	4,014	1,792	389	1,222	512	99
Median earnings	$7.63	$8.45	$8.69	$5.26	$12.07	$6.93
Per cent with earnings under $5	25.2	16.9	20.8	46.1	7.4	28.3
Per cent with earnings under $10	63.7	60.4	54.2	82.1	37.9	65.7
Per cent with earnings under $12	76.1	75.5	67.4	90.6	49.2	79.8
Per cent with earnings under $15	90.4	93.5	84.3	97.5	68.4	83.8
Under $2	95	24	6	58	3	4
$2 and under $3	266	79	24	146	7	10
3 and under 4	352	101	36	197	13	5
4 and under 5	300	99	15	162	15	9
5 and under 6	488	204	34	183	52	15
6 and under 7	351	182	25	98	39	7
7 and under 8	247	118	33	69	23	4
8 and under 9	323	199	31	53	32	8
9 and under 10	134	77	7	37	10	3
10 and under 11	407	220	43	79	52	13
11 and under 12	90	50	8	25	6	1
12 and under 13	295	145	23	64	60	8
13 and under 14	130	91	7	17	14	1
14 and under 15	149	86	36	3	24	.....
15 and under 16	231	75	42	20	89	5
16 and under 18	55	8	10	5	31	1
18 and under 20	48	14	5	2	23	4
20 and over	53	20	4	4	19	6
Not reporting	240	61	17	121	29	12

[1] New York State Department of Labor, Division of Women in Industry and Minimum Wage, *Wages and Family Responsibilities of Employed Women Accepted for Relief by the Emergency Relief Bureau, New York City, May to September, 1935*, unpublished report, 1935.

876 Table XVII

MEMBERS OF THE LAUNDRY MINIMUM WAGE BOARD

New York State, 1933

Representing the Public:

Mr. Raymond V. Ingersoll of Brooklyn, lawyer, and since 1924 arbitrator in the New York cloak
877 and suit industries, *Chairman of the Board.*

Mrs. Elinore M. Herrick of New York, Executive Secretary of the Consumers' League of New York and formerly production supervisor and supervisor of training for the DuPont Rayon Company.

Mrs. Caroline O'Day of Rye, active in the League of Women Voters, Women's City Club, Con-
878 sumers' League, and Women's Trade Union League; Associate Chairman, Democratic State Committee; member of National Democratic Committee.

Representing the Employees:

Miss Pauline Newman of the New York Women's
879 Trade Union League. Appointed July 28th to serve in place of *Miss Sadie Reisch,* organizer for the Women's Trade Union League, who resigned because of illness.

Mrs. Mae Epple of Albany, an employee of the Killip Laundry, and President of the Industrial League of the Albany Y.W.C.A.

880 *Mr. Joseph Mackey* of New York, Secretary of the Laundry Workers' International Union, Local No. 280. Appointed August 4th to serve after the death of *Mr. Harry L. Morrison* of Troy, General Secretary-Treasurer of the Laundry Workers' International Union.

Representing the Employers: 881

Mr. Harold K. Wilder of New York, Secretary of the Laundry Board of Trade, representing laundryowners of greater New York.

Mr. Harry D. Wemple of Buffalo, Secretary of the New York State Laundryowners' Association.

Mr. C. O. John of the Highland Laundry Service, 882
Peekskill. Appointed July 26th to serve after the resignation, because of illness, of *Mr. Fred P. Stafford* of Briarcliff Manor, a Director of the New York State Laundryowners' Association and member of the Westchester County Laundry Board of Trade. Before the appointment of Mr. John, the vacancy left by Mr. Staf- 883
ford's resignation was filled temporarily by *Mr. Leland P. Hamilton,* President of the New York State Laundryowners' Association and of the Otsego Laundry Co., Inc., Oneonta.

Secretary: Frieda S. Miller, Director, Division of Women in Industry and Minimum Wage, New York State Department of Labor. 884

885

Table XVIII—Compliance of Laundrieswith Wage Orders, by Locality, 1933–1935 [1]

Laundries	New York State			New York City Area			Outside New York City Area		
	1933	1934	1935	1933	1934	1935	1933	1934	1935
Number of laundries reporting	2,205	2,119	2,047	1,863	1,777	1,708	342	342	339
Number of laundries paying women and minors:									
Less than minimum rates [2]	592	156	122	510	109	101	82	47	21
Minimum rates [3]	594	774	733	417	578	512	177	196	221
More than minimum rates [4]	1,019	1,189	1,192	936	1,090	1,095	83	99	97
Per cent of laundries paying women and minors:	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Less than minimum rates [2]	26.9	7.4	6.0	27.4	6.1	5.9	24.0	13.7	6.2
Minimum rates [3]	26.9	36.5	35.8	22.4	32.5	30.0	51.7	57.3	65.2
More than minimum rates [4]	46.2	56.1	58.2	50.2	61.3	64.1	24.3	28.9	28.6

[1] Compiled from New York State Department of Labor, Division of Women in Industry and Minimum Wage, *Report to the Industrial Commissioner, The Effect of Directory Order No. 1 on the Wages of Women and Minors in Laundries in New York State and the Need for a Mandatory Wage Order Governing Laundry Occupations*, mimeographed report, 1934, Appendix Table IV; and *Wages and Hours of Women and Minors in New York State Laundries, November 1934, and November 1935*, unpublished reports, 1934, 1935.

[2] Includes laundries in which any women or minors were being paid less than the minimum rates.

[3] Includes laundries in which all women and minors were being paid at least the minimum rates, with the exception of those in which more than half were being paid more than the minimum rates.

[4] Includes laundries in which more than half the women and minors were being paid more than the minimum rates.

Table XIX—Laundry Employees Classified According to the Relation of Their Earnings to the Minimum Rates Set by Wage Orders, 1933–1935 [1]

Laundry Employees	New York State			New York City Area			Outside New York City Area		
	1933	1934	1935	1933	1934	1935	1933	1934	1935
Number of women and minors reported	22,095	21,386	21,892	17,375	16,745	17,010	4,720	4,641	4,882
Number receiving:									
Less than minimum rates	8,338	466	295	8,002	364	247	336	102	48
Minimum rates	6,860	12,583	12,381	4,250	9,964	9,633	2,610	2,619	2,748
More than minimum rates	6,897	8,337	9,216	5,123	6,417	7,130	1,774	1,920	2,086
Per cent receiving:	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Less than minimum rates	37.7	2.2	1.3	46.1	2.2	1.4	7.1	2.2	1.0
Minimum rates	31.1	58.8	56.6	24.4	59.5	56.6	55.3	56.4	56.3
More than minimum rates	31.2	39.0	42.1	29.5	38.3	41.9	37.6	41.4	42.7

[1] Compiled from New York State Department of Labor, Division of Women in Industry and Minimum Wage, *Report to the Industrial Commissioner, The Effect of Directory Order No. 1 on the Wages of Women and Minors in Laundries in New York State and the Need for a Mandatory Wage Order Governing Laundry Occupations*, mimeographed report, 1934, Appendix Table VI; and *Wages and Hours of Women and Minors in New York State Laundries, November 1934, and November 1935*, unpublished reports, 1934, 1935.

Table XX—Compliance of Laundries with Wage Orders, by Size of Laundry, November 1935 [1]

Size of Laundry	Laundries Paying Women and Minors—			
	Total	Less than minimum rates [2]	Minimum rates [3]	More than minimum rates [4]
	Number			
Total	2,047	122	733	1,192
Less than 10 employees	1,480	58	377	1,045
10 to 24 employees	203	16	116	71
25 to 49 "	169	20	110	39
50 to 99 "	120	16	84	20
100 to 199 "	53	7	39	7
200 employees and over	22	5	7	10
	Per Cent			
Total	100.0	6.0	35.8	58.2
Less than 10 employees	100.0	3.9	25.4	70.6
10 to 24 employees	100.0	7.9	57.1	35.0
25 to 49 "	100.0	11.8	65.1	23.1
50 to 99 "	100.0	13.3	70.0	16.7
100 to 199 "	100.0	13.2	73.6	13.2
200 employees and over	100.0	22.7	31.8	45.4

[1] New York State Department of Labor, Division of Women in Industry and Minimum Wage, *Wages and Hours of Women and Minors in New York State Laundries, November 1935*, unpublished report, 1935.

[2] Includes laundries in which any women or minors were being paid less than the minimum rates.

[3] Includes laundries in which all women and minors were being paid at least the minimum rates, with the exception of those in which more than half were being paid more than the minimum rates.

[4] Includes laundries in which more than half the women and minors were being paid more than the minimum rates.

Table XXI—Number of Men and Women Employed in Laundries Covered by Wage Orders, 1933–1935 [1]

901

Date	Number of laundries	Number of Employees			Per cent women form of total
		Total	Males	Females	
New York State					
November, 1933	2,225	36,786	14,657	22,129	60.2
November, 1934	2,256	35,646	14,200	21,446	60.2
November, 1935	2,203	36,483	14,595	21,888	60.0
New York City Area					
November, 1933	1,881	29,519	12,062	17,457	59.1
November, 1934	1,893	28,372	11,667	16,705	58.9
November, 1935	1,840	28,818	11,942	16,876	58.6
Outside New York City Area					
November, 1933	344	7,267	2,595	4,672	64.3
November, 1934	363	7,274	2,533	4,741	65.2
November, 1935	363	7,665	2,653	5,012	65.4

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[1] Compiled from records of the New York State Department of Labor, Division of Women in Industry and Minimum Wage.

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975

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985

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Supreme Court of the United States

OCTOBER TERM, 1935.

No. 838.

FREDERICK L. MOREHEAD, as Warden of the City Prison of the Borough of Brooklyn,
Petitioner,

vs.

PEOPLE ex rel. JOSEPH TIPALDO,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR RESPONDENT.

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ACKERMAN PRESS, Inc., 142 Liberty St., 'Phones Rector 2-5356-7

INDEX.

STATEMENT.

	PAGE
The Nature of the Proceeding	1
Opinions and Jurisdiction	2
The Statute	3
Summary of Argument	6

ARGUMENT.

Part I.	Analysis of the Statute in the light of principles in *Adkins* v. *The Children's Hospital* and the contentions of the Petitioner	10
	(1) The so-called standard	10
	(2) The scope of *Adkins* v. *The Children's Hospital*	17
	(3) The alleged change in conditions	22
	(4) The interference with fundamental rights regardless of standard	23
	(5) The ends sought are the same as in previous price-fixing schemes for labor	29
Part II.	Fundamental principles of valid legislative price-fixing are decisive in this case	33
	1. Rules governing price-fixing	33

PAGE

A. Freedom from price-fixing is the rule and not the exception 35

B. The desirability of price-fixing and the difficulty in dealing with evils by other methods no warrant for interference with freedom of contract 36

C. Rate-making, being a taking of property for supposed public benefit, must comply with the requirements of just compensation 38

D. Price-fixing is justified only as a protection to the consuming and using public, and the price regulated is the price paid by the public 40

2. Basis for the distinction between wages of employees and rates for the use of property in constitutional price-fixing 42

3. Review of cases illustrating and applying the distinction 47

Conclusion 55

Appendix A—Opinions of the Court of Appeals 57

Appendix B—Mandatory Order and Regulations of Commissioner 82

TABLE OF CASES.

PAGES

Adair v. United States (208 U. S. 161, 174-175) 24, 36, 47
Adams v. Tanner (244 U. S. 590) 50
Adkins v. Children's Hospital (261 U. S. 525, 555, 557, 559) 2, 10, 17, 18, 19, 21, 30, 33, 50, 54
Allgeyer v. Louisiana (165 U. S. 578, 589) 24

Bailey v. Drexel Furniture Co. (259 U. S. 20, 37) 37
Board v. New York Telephone Co. (271 U. S. 23, 31) 39
Bosley v. McLaughlin (236 U. S. 385) 49
Bunting v. Oregon (243 U. S. 426) 26, 27, 50
Butchers' Union Co. v. Crescent City Co. (111 U. S. 746, 757) 24

Coppage v. Kansas (236 U. S. 1, 14, 18) 25, 27, 32, 49
Cotting v. Kansas City (183 U. S. 79, 91) 39

Donham v. West-Nelson Mfg. Co. (273 U. S. 657) 19, 30, 33, 54
Dunham v. Ottinger (243 N. Y. 423) 16

Erie Railroad Co. v. Williams (233 U. S. 685) 24, 48

Fairmont Creamery Co. v. Minnesota (274 U. S. 1, 10) 54
Frisbie v. United States (157 U. S. 160) 47

Hicklin v. Coney (290 U. S. 169, 172) 17
Holcombe v. Creamer (231 Mass. 99) 26, 27
Holden v. Hardy (169 U. S. 366, 392, 397) 22, 43, 47
Home Bldg. & Loan Assn. v. Blaisdell (290 U. S. 398, 439) 28
Hurtado v. California (110 U. S. 516, 535, 536) 36, 37

Kent Stores of New Jersey, et al., v. Wilentz, Atty. Gen. (U. S. Law Weekly, March 24, 1936) 54
Knights of Pythias v. Meyer (265 U. S. 30, 32) 17
Knoxville Iron Co. v. Harbison (183 U. S. 13) 23, 47

McKeen v. Delancy's Lessee (5 Cranch. 22, 32) 17
McLean v. Arkansas (211 U. S. 539) 23, 48

PAGES

Meyer v. Nebraska (262 U. S. 390, 399-400) 25
Miller v. Wilson (236 U. S. 373) 49
Muller v. Oregon (208 U. S. 412) 48
Murphy v. Sardell (269 U. S. 530) 19, 30, 33, 51, 54

Near v. Minnesota (283 U. S. 697, 707-708) 20, 26, 34
Nebbia v. New York (291 U. S. 502, 538) 22, 41

O'Gorman & Young v. Hartford Insurance Co. (282 U. S. 251) 22, 26, 27, 41

Patterson v. Bark Eudora (190 U. S. 169) 35, 47
Pennsylvania Coal Co. v. Mahon (260 U. S. 394, 415, 416) 37
Prudential Ins. Co. v. Cheek, 259 U. S. 530, 536 25

Radice v. New York (264 U. S. 292) 51, 54
Ribnik v. McBride (277 U. S. 350, 356, 357, 358) 35, 38, 45, 52
Riley v. Mass. (232 U. S. 671) 48

Smith v. Texas (233 U. S. 630) 48
Smyth v. Ames (169 U. S. 466, 547) 39

Tagg Brothers v. United States (280 U. S. 420) 42, 52
Tioga R. R. v. Blossburg & Corning R. R. (20 Wall. 137, 143) 17
Truax v. Raich (239 U. S. 33, 41) 25, 43, 49
Tyson and Brother v. Banton (273 U. S. 418, 442, 445) 30, 37, 51, 54

West v. C. & P. Telephone Co. (295 U. S. 662, 671) 39
Wichita R. R. & Light Co. v. Public Utilities Comm. (260 U. S. 48, 59) 12
Wilson v. New (243 U. S. 332) 49
Wolff Co. v. Court of Industrial Relations (262 U. S. 522, 534, 539, 540, 544) 20, 26, 42, 45, 50, 54

STATUTES CITED.

	PAGES
Laws of Arizona, 1923, Ch. 3	19
Laws of Arkansas, 1915, 1919, 1921 (Crawford & Moses' Digest, Secs. 7102-7114)	19
Laws of New Jersey, 1935, Ch. 281	54
Laws of New York, 1933, Ch. 584	2, 3, 10

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 838.

FREDERICK L. MOREHEAD, as Warden of the City Prison of the Borough of Brooklyn,

Petitioner,

vs.

PEOPLE ex rel. JOSEPH TIPALDO,

Respondent.

BRIEF FOR RESPONDENT.

Nature of the Proceeding.

The case comes to this Court on writ of certiorari under Section 237 (b) of the Judicial Code, Section 344 (b), U. S. C. A., to the Supreme Court of New York to review an order entered March 9, 1936 (R. 19), on the remittitur of the Court of Appeals of New York (R. 18) reversing an order of the Special Term of the Supreme Court of New York (R. 7) and discharging the relator in a *habeas corpus* proceeding.

The charge against the relator was non-compliance with an order of the Industrial Commissioner of New York establishing minimum wages for women and children in laundries, made pursuant to Chapter 584 of the Laws of New York of 1933 (R. 4).

Opinions and Jurisdiction.

The opinion of the Special Term is reported in 156 Misc. Rep. 522; 282 N. Y. Supp. 576; and will be found at page 8 of the Record.

The opinions of the Court of Appeals, reported in 270 N. Y. 233, are not printed in the Record, but are annexed as an Appendix to this brief.

The claim of the relator was that the statute violated the 14th Amendment of the Federal Constitution and Article I, Section 6, of the New York State Constitution (R. 4).

The Court of Appeals decided the case on the authority of *Adkins* v. *The Children's Hospital* (261 U. S. 525), decided under the Fifth Amendment.

Article I, Section 6, of the New York State Constitution says, "No person shall * * * be deprived of life, liberty or property without due process of law". The 14th Amendment of the Federal Constitution says, "nor shall any State deprive any person of life, liberty, or property, without due process of law". As Chief Judge Crane said, "both provisions are the same in this particular" (Appendix, p. 57).

Obviously the decision would have been the same irrespective of whether the case had been decided under Article I, Section 6, of the New York State Constitution or under the 14th Amendment of the Federal Constitution. The remittitur states that a question under the Federal Constitution was presented and necessarily passed upon (R. 18). It is for this Court to decide the question of its own jurisdiction.

The Statute.

The pertinent provisions of the statute, which is annexed as an Appendix to the brief of the Attorney General of New York, are the following:

"*Sec. 551. Definitions.* As used in this article:

* * * * * *

"7. 'An oppressive and unreasonable wage' shall mean a wage which is both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health.

"8. 'A fair wage' shall mean a wage fairly and reasonably commensurate with the value of the service or class of service rendered. In establishing a minimum fair wage for any service or class of service under this article the commissioner and the wage board without being bound by any technical rules of evidence or procedure (1) may take into account all relevant circumstances affecting the value of the service or class of service rendered, and (2) may be guided by like considerations as would guide a court in a suit for the reasonable value of services rendered where services are rendered at the request of an employer without contract as to the amount of the wage to be paid, and (3) may consider the wages paid in the state for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards.

* * * * * *

"*Sec. 552. Contracts of employment void as against public policy.* It is hereby declared to be against public policy for any employer to employ any woman or minor in an occupation in this state at an oppressive and unreasonable wage as defined in section five hun-

dred and fifty-one of the article and any contract, agreement or understanding for or in relation to such employment shall be null and void.

"*Sec. 555. Constitution of wage board.*

* * * * * *

"4. Within sixty days of its organization a wage board shall submit a report including its recommendations as to minimum fair wage standards for the women or minors in the occupation or occupations the wage standards of which the wage board was appointed to investigate. If its report is not submitted within such time the commissioner may constitute a new wage board.

"5. A wage board may differentiate and classify employments in any occupation according to the nature of the service rendered and recommend appropriate minimum fair rates for different employments. A wage board may also recommend minimum fair wage rates varying with localities if in the judgment of the wage board conditions make such local differentiation proper and do not effect an unreasonable discrimination against any locality.

"6. A wage board may recommend a suitable scale of rates for learners and apprentices in any occupation or occupations, which scale of learners' and apprentices' rates may be less than the regular minimum fair wage rates recommended for experienced women or minor workers in such occupation or occupations.

"*Sec. 558. Special licenses.* For any occupation for which minimum fair wage rates have been established the commissioner or the director may cause to be issued to a woman or minor, including a learner or ap-

prentice, whose earning capacity is impaired by age or physical or mental deficiency or injury, a special license authorizing employment at such wages less than such minimum fair wage rates and for such period of time as shall be fixed by the commissioner or the director and stated in the license.

"*Sec. 563. Right of review.* All questions of fact arising under this act except as otherwise herein provided shall be decided by the commissioner or the director and there shall be no appeal from the decision of the commissioner or the director on any such question of fact, but there shall be a right of review by the industrial board and the courts as provided in article three of the labor law from any ruling or holding on a question of law included or embodied in any decision or order of the commissioner or the director.

"*Sec. 565. Penalties.*

* * * * * *

"2. Any employer or the officer or agent of any corporation who pays or agrees to pay to any woman or minor employee less than the rates applicable to such woman or minor under a mandatory minimum fair wage order shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than fifty nor more than two hundred dollars or by imprisonment of not less than ten nor more than ninety days or by both such fine and imprisonment, and each week in any day of which such employee is paid less than the rate applicable to him under a mandatory minimum fair wage order and each employee so paid less shall constitute a separate offense."

SUMMARY OF ARGUMENT.

I. Analysis of the Statute in the Light of Principles in Adkins v. The Children's Hospital (261 U. S. 525) and the Contentions of the Petitioner.

(1) Wholly apart from the fundamental ground of invalidity, the challenged statute vests the Wage Board and the Industrial Commissioner with arbitrary power.

(2) The case is ruled by the *Adkins* case, twice reaffirmed by this Court.

(3) No change has occurred since its decision to justify a departure from the Adkins case.

(4) Regardless of standard the right invaded is one of the inalienable rights guaranteed to the citizen in a free country.

(5) The ends sought are the same as in previous price-fixing schemes for labor. The direct end is private and the public interest asserted as a justification for the exercise of the police power is indirect.

II. Fundamental Principles of Valid Legislative Price-Fixing Are Decisive in This Case.

(1) The principles upon which the question of the legality of price-fixing for labor must be decided have been settled in a long line of decisions of this Court interpreting the Fifth and Fourteenth Amendments.

A. The first of these principles is that immunity from price-fixing is the rule and not the exception.

B. The second principle is that desirability of the legislation as a speedy remedy for the supposed evils, and the difficulty of dealing with the supposed evils by other methods, constitute no warrant for resort to price-fixing.

C. The third principle is that price-fixing, being a direct taking of property for a supposed public benefit, can not be resorted to unless "just compensation" is given in return, and that just compensation requires an adequate and reasonable return upon the fair market value of that which is devoted to public use, or, as it is sometimes expressed, "affected with a public interest".

D. The fourth principle is that whatever the ground may be upon which price-fixing of the use of property is justified—whether it be because the property is "devoted to a public use", "affected with a public interest" or the business in which the property is used is of such a nature that "unrestricted competition is an inadequate safeguard" to the public—the limit of such price-fixing is that it must be in relation to the price which is charged to the public as a whole and may not be extended to dealings not with the public but within the organization conducting the business, as for example, the relation of employer to employees.

(2) These principles suggest the vital distinctions, from the constitutional standpoint, in all legislative price-fixing between *property* and the use of property, on the one hand, and *personal services*, on the other.

A. First, property originates with the state and reverts to the state; it is held in a sense at the will of the state.

B. Second, property may be taken by the state for public use. This power is inherent in the state. But liberty—personal services—may not be taken by the state for public use or any other use except as a punishment for crime or in time of war.

C. Third, property, in our theory of government, always has its equivalent in money or other thing of value. So when property is taken for public use, either by taking the property directly or by taking indirectly by diminishing the income from the property, this equivalent may always be given in return, and thus the amount of property held by the individual is not diminished or impaired.

D. Fourth, so when the use of property is regulated by price-fixing, the constitutional guaranty that property shall not be taken without just compensation may be fulfilled; but when *personal services* are regulated by price-fixing, there can be no equivalent offered and the constitutional guaranty can not be fulfilled.

E. Fifth, it follows from these rules as to property and as to personal services that, just as *property* may be taken for a public use, so by the manner of its use it may, under certain circumstances, be said to have been dedicated to a public use or devoted to a public use or used in such way that the public has an interest in its use, and thus arises a right to fix rates; but, by like token, personal services which *can not* be taken for a public use, also, by their very nature, *can not* be said to be dedicated to a public use or devoted to a public purpose, whatever may be the manner in which they are used, and whether the characterization of "public use" is by judicial reasoning or legislative declaration.

(3) Cases illustrating and applying the distinction reviewed.

(4) No change has taken place since the decision of this Court in *Adkins* v. *The Children's Hospital* (261 U. S. 525) which would warrant a reversal of that case, nor has any aspect of minimum wage laws developed which was not considered and determined in that case.

ARGUMENT.

PART I.

Analysis of the statute in the light of principles in Adkins v. The Children's Hospital (261 U. S. 525) and the contentions of the petitioner.

(1) THE SO-CALLED STANDARD.

The statute (Section 551, subdivision 7, and Section 552; p. 3, *supra*) prohibits what it defines as "an oppressive and unreasonable wage", i. e., one which is "both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health". Plainly the Wage Board may not recommend or the Commissioner prescribe a wage prohibited by the statute. The minimum wage prescribed must therefore be "a fair wage" and must not be "an oppressive and unreasonable wage" as those terms are defined by the statute, and so the Court of Appeals held.

Both of those standards are arbitrary. Both are so vague and indefinite as to leave the matter to the arbitrary decision of the Board and the Commissioner. Nothing needs to be added to what this Court has already said in respect of the living wage standard (*Adkins* v. *Children's Hospital*, 261 U. S. 525, 555-559).

The "fair wage" standard is subject to the same objections and is even more impossible of practical application. As defined by the statute, the "fair wage" is not the "reasonable value of the services rendered", but a wage "fairly and reasonably commensurate with the value of the service or *class of service* rendered" (*supra*, p. 3). Whatever that may mean, it obviously does not purport to base the wage standard for an occupation upon the reasonable value of particular service but only of the *class of service*. A standard is to be set up for the service or *class of serv-*

ice which takes no account whatever and can take no account whatever of the capacity, experience, training, industry or earning power of the employee, the character of the place where the work is done or the circumstances or surroundings of the employment.

The statute prescribed no rule or standard of measure whatsoever. It says that the Board "(1) *may* take into account all relevant circumstances affecting the value of the service or class of service rendered", and "(2) *may* be guided by like considerations as would guide a court in a suit for the reasonable value of services rendered where services are rendered at the request of an employer without contract as to the amount of the wage to be paid", and "(3) *may* consider the wages paid in the state for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards" (*supra*, p. 3).

(1) is meaningless. (3) permits the Board to take into account the wages paid by employers whose wage rates the Board finds to be "fair", and (2) cannot apply since in finding the value of services on *quantum meruit* the Court determines the value of the particular services in question and does consider the industry, capacity, training, experience and earning power of the employee, the character of the place where the work is done, the circumstances or surroundings of the employment and the amount commonly paid in the locality for like services, not the amount paid by those who conform to standards set up by the Board—all of which must be ignored in determining the value of the "class of service" rendered.

Plainly those permissive clauses, (1), (2) and (3) of subdivision 8 of Section 551, provides no standard or rule of practical application for determining the value of the "class of service", but the Board is given the arbitrary power to find a wage which it deems "fairly and reasonably commensurate with the value of the service or *class*

of service" and its determination is not reviewable, for Section 563 provides that "there shall be no appeal from the decision of the commissioner or the director on any such question of fact" but only a right of review "as provided in article three of the labor law from any ruling or holding on a question of law included or embodied in any decision or order of the commissioner or the director" (*supra*, p. 5).

"As provided in article three of the labor law" obviously refers to the method of review not to the questions to be reviewed, which are questions of law "included or embodied in any decision or order of the commissioner or director".

As this Court said in the case of *Wichita Railroad & Light Co.* v. *Public Utilities Commission* (260 U. S. 48, 59):

> "In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action."

The fact brief of the Attorney General of New York (pp. 88-145) shows the complexity and difficulty of the problem of standardizing wages and the variety of the factors involved. Attempts at standardization have been made by particular industrial companies. Arbitration boards have adjusted wages for groups. In such cases there is opportunity for compromise and for the adjustment of differences, and the matter is finally settled by agreement. Here a board is empowered to impose a standard not for one employer or one group of employees but for all employees in an industry, and in the last analysis

any such standard is bound to be merely a compromise of individual opinion. That may be done in countries whose laws are not subject to our constitutional limitations. Such laws, notably those of Great Britain, recognize the fact that the establishment of standards must necessarily be a matter of compromise, not the result of applying rules.

Under our system of government such matters must be left to the agreement of the parties.

Even if the matter were capable of determination by rule, no rule of practical application has been prescribed by the New York statute to determine the value of a "class of service." It is left to the absolute discretion of the Board to determine what of the great variety of factors involved, many of which are referred to in the fact brief, shall be taken into account and what importance each shall have. The complexity of the problem is shown by the quotations from the publication on the work of the National Council on Industrial Relations for the Electrical Construction Industry on page 104 of the fact brief:

> "A review of these 33 decisions reveals the Council struggling to set up new standards of procedure in the midst of the general welter of instinctive conduct * * *.
>
> "Wage scales are adjusted, in so far as possible, in accord with the principles enunciated in the agreed policies * * *."

And on page 106:

> "The Council is under a clear obligation to rest its decision on a sound principle; although it cannot always avoid some degree of compromise; but compromise is tolerated, not accepted as a principle in conciliation."

The comparative emphasis to be put upon the job and the skill, capacity, training, industry and experience of the

employee is manifestly a matter for compromise and agreement. It is not a subject for the arbitrary decision of any board, and of course under the challenged statute, as we have already seen, no consideration whatever can be given to the skill, experience, training, capacity and industry of the worker or to the quality and nature of the particular work done, the conditions of the place of work and the circumstances and surroundings of the employment. As stated in the quotation on page 83 of the fact brief, "A spirit of mutual confidence and faith based on square dealing between employees and management is essential to maximum satisfaction from all standards." Yet the statute undertakes to substitute for "mutual confidence and faith based on square dealing" the arbitrary decision of a Board which can take no account whatsoever of facts that are absolutely essential to square dealing.

Section 555, subdivision 4, says that "within sixty days of its organization a wage board *shall* submit a report", etc.

Subdivision 5 provides that "a wage board may differentiate and classify employments in any occupation according to the nature of the service rendered and recommend appropriate minimum fair rates for different employments. A wage board may also recommend minimum fair wage rates varying with localities if in the judgment of the wage board conditions make such local differentiation proper and do not effect an unreasonable discrimination against any locality."

Subdivision 6 says that "a wage board may recommend a suitable scale of rates for learners and apprentices in any occupation or occupations, which scale of learners' and apprentices' rates may be less than the regular minimum fair wage rates recommended for experienced women or minor workers in such occupation or occupations."

Section 556 provides that if the report is accepted the Commissioner may make regulations to implement the re-

port and to safeguard the minimum fair wage standards to be established.

Said subdivision 4, of Section 555 is mandatory. Subdivisions 5 and 6, immediately following, are plainly permissive. They were so construed by the Board and the Commissioner of Labor in the instant case.

The Attorney General of New York annexed to his brief in the Court of Appeals the mandatory order and the regulations governing women and minors in laundry occupations. He has omitted them from his brief in this Court. We have supplied the omission by appending a copy as an appendix to our brief.

It will be observed that one rate is prescribed for all who work in a laundry within the New York City area and another for all who work in a laundry anywhere else in the state outside the New York City area, and that the regulations require the same minimum to be paid to all, including learners, apprentices and minors, the only variation authorized being by special permit in the single case of impairment of earning capacity.

Of course we are not concerned with what has been done so much as with what may be done under the statute, but what has been done is plainly permitted by the statute and demonstrates the arbitrary power conferred on the Board and the Commissioner.

Everyone knows that the conditions, circumstances and surroundings of different laundries vary greatly. Everyone knows that the work in different laundries varies greatly. Fine work is done in some, plain work in others. The care, skill and experience required of the worker varies with the character and type of work. The charges that laundries are able to make for their work varies with the place, the type and the quality of the work done. Some employers may be able to comply with the standard imposed; others may not. The Board is not required to give heed to such considerations and it is manifest that it would have been wholly impracticable to do so even if the statute had required it.

The Attorney General of New York says that though the language of the statute is permissive the courts have construed such language to be mandatory, citing *Dunham* v. *Ottinger,* 243 N. Y. 423.

In that case the statute empowered the Attorney General to prosecute a certain class of cases. Of course it imposed a duty. The duty imposed in the instant case was the duty of the Board to report its recommendations as to minimum fair wage standards. The statute said it "*shall* submit a report", etc. Immediately following are the clauses saying what the Board *may* do, obviously leaving the matter entirely to its discretion. But the permissive clauses, even if mandatory, take no account whatever of the skill, capacity and [illegible]y of the employee, the character of the place or the conditions or surroundings of the employment.

Judge Lehman, who wrote the dissenting opinion in the Court of Appeals, considered those clauses as permissive, but thought they became mandatory where the failure to exercise the permissive right would be unreasonable and that in that regard the judgment of the Board was subject to judicial review (Appendix, p. 80). But the statute permits a review only of questions "of law included or embodied in any decision or order of the commissioner or the director" (Sec. 563, p. 5, *supra*). We are dealing with the validity of a statute which plainly gives the board discretion in the matter.

The fact brief of the Attorney General of New York contains the explanation by the Board of its determination. The Board fixed the minimum "at as high a figure as", it thought, "under present conditions can be effectively maintained" in the hope that it might be able to do better later on (Fact Brief, p. 68). The Board started out with moderation, but it found itself utterly unable to observe any standard prescribed by the statute and it frankly admitted that it made no attempt to do so. It decided what

the industry could bear, but we have not come to such a pass in this country yet that our liberties are to be subjected to such power, however moderately it may be exercised by administrative boards at a given time. The Board's statement shows the impossibility of following any standard or rule and the practical necessity of arriving at conclusion by a compromise of individual opinion.

(2) THE SCOPE OF ADKINS v. THE CHILDREN'S HOSPITAL (261 U. S. 525).

The Attorney General of New York says that the Court of Appeals misconstrued the statute, that its construction was a "basic misconception" (Brief, p. 10).

The Court said:

> "This is a difference in phraseology and not in principle. The New York act, as above stated, prohibits an oppressive and unreasonable wage, which means *both* less than the fair and reasonable value of the services rendered *and* less than sufficient to meet the minimum cost of living necessary for health. The act of Congress had one standard, the living wage; this State act has added another, reasonable value. The minimum wage must include both" (Appendix, p. 60).

That construction is controlling.

> *Hicklin* v. *Coney*, 290 U. S. 169, 172.
> *Knights of Pythias* v. *Meyer*, 265 U. S. 30, 32.
> *Tioga R. R.* v. *Blossburg & Corning R. R.*, 20 Wall. 137, 143.
> *McKeen* v. *Delaney's Lessee*, 5 Cranch. 22, 32.

We have shown under the preceding subdivision that the standard of "value of the service or class of service rendered" possesses the infirmities of the living wage stand-

ard considered in the *Adkins* case and that whilst superficially the language of subdivision 8 of Section 551 may appear to have some relation to the service performed, upon analysis it is found to have no substantial "causal connection" with the business, the contract of employment, or the work done by the employee.

We shall not venture to tell this Court how to construe its own decisions, but we have understood and we believe the bench and bar throughout the country have understood that the *Adkins* case decided a much more fundamental question than that of the standard involved, namely, the constitutional validity of an act thus described by Mr. Justice Sutherland speaking for a majority of the Court:

> "It is simply and exclusively a price-fixing law, confined to adult women (for we are not now considering the provisions relating to minors), who are legally as capable of contracting for themselves as men. It forbids two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequence may be to oblige one to surrender a desirable engagement and the other to dispense with the services of a desirable employee" (*Id.*, pp. 554, 555).

The cases sustaining certain interference with the liberty of contract were classified, considered separately and thus generally distinguished:

> "In none of the statutes thus sustained, was the liberty of employer or employee to fix the amount of wages the one was willing to pay and the other willing to receive interfered with" (*Id.*, p. 547).

And the final conclusion of the Court was thus stated:

> "Finally, it may be said that if, in the interest of the public welfare, the police power may be invoked to justify the fixing of a minimum wage, it may, when the public welfare is thought to require it, be invoked to justify a maximum wage" (*Id.*, p. 560).

The decision in the *Adkins* case was twice reaffirmed by this Court.

> *Murphy* v. *Sardell*, 269 U. S. 530.
> *Donham* v. *West-Nelson Mfg. Co.*, 273 U. S. 657.

The *Murphy* case involved the validity of an act of the Legislature of the State of Arizona passed on February 13, 1923, amending Sections 1 and 2 of Chapter 38 (H. B. No. 3) of the Session Laws of the Third Legislature of the State of Arizona, 1917, prohibiting the employment of females in certain occupations at less than $16 per week and declaring a lesser amount to be "inadequate to supply the necessary cost of living to any such female, to maintain her health, and to provide her with the common necessaries of life."

Mr. Justice Holmes, who dissented in the *Adkins* case, noted his concurrence in that case on the ground that he regarded himself bound by the decision in the *Adkins* case.

The *Donham* case involved the validity of an act of the Legislature of the State of Arkansas passed in 1915, as amended in 1919 and 1921 (Crawford and Moses' Digest of the Statutes of Arkansas, Sections 7102 to 7114), prohibiting the employment of any female worker in certain establishments at less than a stated minimum per day. The act also provided by Section 10 (*Id.*, 7111) that the Commission, if it found after an investigation that a lower minimum was adequate "to supply a woman, or minor female worker * * * the necessary cost of proper living,

and to maintain the health and welfare of such woman, or minor female workers," or if it found that the minimum set was inadequate for that purpose, could, after a public hearing and an opportunity to interested employers and employees to be heard, "issue an order establishing a minimum wage rate that in their judgment is reasonable". In other words, the legislature fixed the minimum wage without saying on what standard it was based, the Commission was then to be set in motion by a finding that the prescribed rate was more than adequate or inadequate under the living standard, as the case might be, but were thereafter to be governed in fixing a different rate by the rule of reasonableness. The entire Court concurred in holding both of those statutes unconstitutional on the authority of the *Adkins* case, except Mr. Justice Brandeis who dissented in each.

The late Chief Justice Taft, who dissented in the *Adkins* case, cited it for the fundamental proposition involved in his judgment in *Wolff Co.* v. *Court of Industrial Relations* (262 U. S. 522, 534). The point decided in that case is thus stated in the concluding paragraph of the Court's judgment (*Id.*, p. 544):

> "We think the Industrial Court Act, in so far as it permits the fixing of wages in plaintiff-in-error's packing house, is in conflict with the 14th Amendment, and deprives it of its property and liberty of contract without due process of law."

Chief Justice Hughes cited it with other cases in *Near* v. *Minnesota* (283 U. S. 697, 707-708) for the broad proposition thus stated:

> "So, while liberty of contract is not an absolute right, and the wide field of activity in the making of contracts is subject to legislative supervision (*Frisbie* v. *United States*, 157 U. S. 161, 165), this court has

> held that the power of the state stops short of interference with what are deemed to be certain indispensable requirements of the liberty assured, notably with respect to the fixing of prices and wages."

The petitioner appears to find comfort in this sentence in Mr. Justice Sutherland's opinion in the *Adkins* case:

> "A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable" (*Id.*, p. 559).

But we are not dealing with such a statute, however understandable it might be, and it is unnecessary to consider whether a statute would be constitutional which enabled the employee to recover the reasonable value of her services despite an agreement for a lesser sum. In such case the Court would consider the relevant factors which, as we have shown under subdivision (1), are necessarily excluded from the consideration of the Board in determining the value of the service or "class of service". We are concerned here with the establishment of standards by a Wage Board which need have little or no relation to the value of the particular service rendered. To say that such a standard is based on *quantum meruit* is to ignore the essentials of *quantum meruit*.

As in the *Adkins* case the challenged act "is not a law dealing with any business charged with a public interest or with public work or to meet and tide over a temporary emergency. It has nothing to do with the character, methods or periods of wage payments. It does not prescribe the hours of labor or conditions under which labor is to be done. It is not for the protection of persons under legal disability or for the prevention of fraud. It is simply and exclusively a price-fixing law, * * *" (*Adkins* case, p. 554).

The decisions subsequent to the Adkins case cited by the Attorney General (*Nebbia* v. *New York*, 291 U. S. 502 and *O'Gorman and Young* v. *Hartford Ins. Co.*, 282 U. S. 251) fall under the exceptions considered in the *Adkins* case.

(3) THE ALLEGED CHANGE IN CONDITIONS.

The suggestion that there has been a change in conditions to warrant a departure now from the *Adkins* case is fanciful. We have had a depression, but the challenged Act is not an emergency statute. The Legislature of New York did pass a companion Act at the same time, known as the Desmond Act, which was applicable to both men and women and was called an emergency measure, but the Governor vetoed it because of doubts of its constitutional validity. So far from justifying a minimum wage law, a depression makes such a law the more harmful and oppressive by increasing the difficulty of the least efficient in securing employment. But the statute is not an emergency statute. There is nothing new in the alleged inequality of bargaining power and there is nothing peculiar to women in it; indeed the breadwinner of the family, usually a man, is under as great compulsion to secure employment as women, certainly under greater compulsion than those women who seek employment to eke out other means of income or support. The inequality of bargaining power was recognized by this Court as far back as *Holden* v. *Hardy* (169 U. S. 366, 397), sustaining a health measure.

The fact brief submitted by the Attorney General of New York indicates an increase in the number of women employed in industry, but of course there are still a great many more necessitous men than women so employed. The fact adverted to would appear to indicate an improvement in the status of women in industry and it would appear by the chart opposite page 30 that the wages of women were much less seriously affected by the depression than the wages of men. There is some statistical material in the

fact brief with respect to the employment of women and children in industry in New York state which was not before the Court in the *Adkins* case, but nothing new is added to the 1106 page—2 volume fact brief of Mr. Frankfurter in the *Adkins* case.

A social philosophy in conflict with the fundamental principles of the American Constitution has doubtless gained many adherents since the decision of this Court in the *Adkins* case, but every argument that can be presented in favor of minimum wage legislation was heard and considered in the *Adkins* case.

(4) THE INTERFERENCE WITH FUNDAMENTAL RIGHTS REGARDLESS OF STANDARD.

The question is not whether the States or the Federal government ought to exercise such a guardianship. It is prohibited in the one case by the Fourteenth Amendment and in the other by the Fifth Amendment. The Attorney General of New York appears to think that inequality in bargaining power has developed since the decision in the *Adkins* case, but few bargains have ever been made between parties of exactly equal bargaining power, and undoubtedly that is especially true in the case of contracts of employment. Adam Smith considered the disparity in bargaining power between employee and employer in his "Wealth of Nations" in 1776.*

To overcome that inequality the law favors and zealously safeguards the right of collective bargaining. That inequality justifies statutes to prevent fraud and overreaching, such as the statute requiring coal to be weighed before screening (*McLean* v. *Arkansas*, 211 U. S. 539); requiring the redemption in cash of store orders issued in payment of wages (*Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13);

*"Wealth of Nations", London, 1776, Book I, Ch. 8, page 30 of McCulloch's Edition.

regulating the time of payment of wages in certain specified industries (*Erie R. R. Co.* v. *Williams*, 233 U. S. 685); and the like. But all of that is very far from the establishment by a State agency of a standard of wages, whether minimum or maximum, for an industry.

It has been claimed that freedom of contract is illusory and it has even been denied that it is protected by the Fifth and Fourteenth Amendments. But this Court has always considered it not only as a constitutional right but as a natural right, as one of the inalienable rights with which man was endowed by his Creator.

As said by Mr. Justice Field in *Butchers' Union Co.* v. *Crescent City Co.* (111 U. S. 746, 757)—"Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment"; by Mr. Justice Peckham in *Allgeyer* v. *Louisiana* (165 U. S. 578, 589)—"but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned"; by Mr. Justice Harlan in *Adair* v. *United States* (208 U. S. 161, 174)—"While, as already suggested, the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal

services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it"; by Mr. Justice Pitney in *Coppage* v. *Kansas* (236 U. S. 1, 14)—"The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contract is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money";—by Mr. Justice Pitney in *Prudential Insurance Co.* v. *Cheek* (259 U. S. 530, 536)—"That freedom in the making of contracts of personal employment, by which labor and other services are exchanged for money or other forms of property, is an elementary part of the rights of personal liberty and private property, not to be struck down directly or arbitrarily interfered with, consistently with the due process of law guaranteed by the Fourteenth Amendment, we are not disposed to question"; by Mr. Justice, now Chief Justice Hughes in *Truax* v. *Raich* (239 U. S. 33, 41)—"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure"; by Mr. Justice McReynolds in *Meyer* v. *Nebraska* (262 U. S. 390, 399-400)—"The established doctrine is that this liberty may not be interfered with, under the guise of protecting

the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts."

In *Wolff Co.* v. *Industrial Court* (262 U. S. 522, 534) the late Chief Justice Taft, speaking for the Court, in relation to a compulsory arbitration act, said:

> "It curtails the right of the employer, on the one hand, and of the employee, on the other, to contract about his affairs. This is part of the liberty of the individual protected by the guaranty of the due process clause of the Fourteenth Amendment."

We have already discussed the *Adkins* case. Since it appears to be the last word spoken by this Court on the subject and is so apposite and forceful we repeat the quotation from what Chief Justice Hughes said in *Near* v. *Minnesota* (283 U. S. 697, 707-708):

> "So, while liberty of contract is not an absolute right, and the wide field of activity in the making of contracts is subject to legislative supervision (*Frisbie* v. *United States,* 157 U. S. 161, 165), this Court has held that the power of the State stops short of interference with what are deemed to be certain indispensable requirements of the liberty assured, notably with respect to the fixing of prices and wages."

The Attorney General of New York cites three cases which he says approved wage fixing statutes:

> *O'Gorman & Young* v. *Hartford Fire Ins. Co.,* 282 U. S. 251.
> *Bunting* v. *Oregon,* 243 U. S. 426.
> *Holcombe* v. *Creamer,* 231 Mass. 99.

The *O'Gorman & Young* case, though subsequent to the *Adkins* case, falls within one of the exceptions considered in that case, i. e., a business affected with a public interest.

Bunting v. *Oregon* was distinguished by Mr. Justice Sutherland as having been decided as an hours not as a wages statute in accordance with the contention made by the learned counsel for the State in that case.

In *Holcombe* v. *Creamer* the decision was put upon the express ground that the statute was not mandatory and decision was reserved on the question whether "a mandatory minimum wage law would violate the provisions" of the constitution of Massachusetts.

It may have been a work of supererogation to quote at such length from the decisions of this Court on a question which it has repeatedly said was settled law, but the truth is that the proponents of this class of legislation have a social philosophy which is opposed to the constitutional guarantees adopted to promote the general welfare. They can not be nullified because some now think they are detrimental to the general welfare. They protect all capable of contracting. The proponents of minimum wage legislation would withdraw that protection from some on the theory that they will be better off without it and that that indirectly will promote the public welfare. But that in effect would nullify the constitutional guarantee, as this Court held in *Coppage* v. *Kansas* (236 U. S. 1, 18).

That case involved the validity of a statute declaring it a misdemeanor, punishable by fine or imprisonment, for an employer to require an employee to agree not to become or remain a member of any labor organization during the time of the employment. Whilst there might be differences of opinion as to whether the end sought by the statute in question, i. e., the protection of a legal right, was within the police power, we submit that the fixing by the State of the price at which one person shall be permitted to render services for another on the ground that

that will be for the public good amounts to a nullification of the constitutional guarantee.

The Fourteenth Amendment is a limitation of the police power and that power cannot be so exercised as to destroy the limitation.

As said by Chief Justice Hughes in *Home Building & Loan Association* v. *Blaisdell* (290 U. S. 398, 439):

> "Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them."

That case involved a "temporary and conditional restraint where vital public interests would otherwise suffer", in a situation produced by an economic disaster, which Chief Justice Hughes likened to fire, flood or earthquake.

The instant case involves the destruction as a permanent policy of the right of parties under no disability freely to contract, the one to render services and the other to pay therefor, except on terms prescribed by an administrative agency.

We say that the direct end sought is private benefit and that the supposed public benefit is at most indirect. We are not now dealing with disasters from either economic or physical causes in which the public interest in whatever happens may become direct and vital. We are dealing solely with the destruction of the right of two parties to agree on the price for which one shall work for the other for the supposed immediate and direct benefit of

one. But the constitutional guarantees cannot be stricken down for the benefit of individuals or groups on the theory that that will ultimately benefit the public.

The framers of the Constitution, of the Bill of Rights and of the 14th Amendment thought it would promote the general welfare to stimulate individual initiative and enterprise and to encourage self-respect and self-reliance. The proponents of minimum wage and similar legislation have a different social philosophy. They think the general welfare will be promoted by striking down the constitutional guarantees and by extending the guardianship of the State over the citizen. Whether they are right or not is for the people, not for the courts, to decide. Experience of a century and a half under what we call the American system, as contrasted with that of all other nations, should strengthen our faith in a system designed to promote individual initiative and independence, to stimulate self-respect and self-reliance and to maintain equal opportunity for all.

(5) THE ENDS SOUGHT ARE THE SAME AS IN PREVIOUS PRICE-FIXING SCHEMES FOR LABOR.

The question before the Court is whether the end sought is within the police power and if so whether the means adopted is appropriate to that end, for no one claims that liberty of contract is absolute.

The Attorney General of New York says that the end sought is (1) the assurance of a fair wage, and (2) the elimination of sources of unfair competition, and apparently also (3) the maintenance of the health of women in industry (Brief, pp. 17-22). None of them furnish any basis for discrimination between men and women. Doubtless the well-being of every individual and of every group indirectly affects all, but the indirect public interest in the wages paid the workers is greatest in the case of wages paid men. Men, as a rule, are the heads of the families, the

breadwinners. Many more men than women are employed in industry. Inequality of bargaining power between employer and employee is not peculiar to women employees; indeed the pressure upon the breadwinner is the greatest. This has been the subject of consideration by economists, publicists and reformers (the latter term is used in its best sense) since long before the adoption of the American Constitution, and under the system established by it the condition of the workers, both men and women, is incomparably better than that of the workers anywhere else in the world.

The so-called "chiseler" who pays low wages and is thus able to undersell his competitor has long been in disfavor, but the "chiseler's" main advantage results from low wages paid to men. Enlightenment and the pressure of public opinion are gradually removing that so-called source of unfair competition, but the suggestion that it is competent for the State to fix the price which every employer shall pay to his employees indirectly to prevent some employers from underselling their competitors serves to emphasize the point that the so-called public interest claimed to be promoted is wholly indirect.

This Court has many times said that "evils are to be suppressed or prevented by legislation which comports with the Constitution".

See

Tyson & Bro. v. *Banton*, 273 U. S. 418, 442.

The liberties of all are not to be destroyed because of the sins of some.

The claim still made that this is a health measure also emphasizes our point. This Court has three times rejected that claim. (*Adkins* v. *Children's Hospital*, 261 U. S. 525, *Murphy* v. *Sardell*, 269 U. S. 530, *Donham* v. *West-Nelson Mfg. Co.*, 273 U. S. 657.) If it were a health measure, the wages paid to heads of families would most certainly be the first thing to be regulated. There is basis

for saying that excessive hours of labor and night work for women directly affect the health of the worker and therefore hours and night work statutes, whether wise or unwise, were within the competence of the legislatures, though thousands of women were deprived of comfortable jobs under healthful surroundings by the night statutes; but the wages paid only indirectly at most affect the health of the recipients, as this Court necessarily decided in the cases just cited.

The physical differences between men and women may furnish reason for discrimination between them, both as to night statutes and as to hours statutes, but the alleged differences in bargaining power are more illusory even than the right of freedom of contract is said by some to be and are wholly irrelevant to the question before the Court. It is said that the statistics show that the wages paid women are on the whole less than the wages paid men for similar work. Undoubtedly that is one of the reasons for the alleged increase in the number of women employed in industry. It might solve the unemployment problem as far as men are concerned by requiring equal pay for men and women, but that would furnish little consolation to women deprived of the right and the opportunity to work for a wage which they were glad to receive. It is said that men are better organized than women, but women may organize the same as men. It is said that the garment workers receive higher wages than the laundry workers because they are better organized. That merely indicates that the women are learning the advantages of collective bargaining. It is said that women are willing to work for less than men to supplement income from other sources. We say that that is their right, protected by the Constitution, and that it is not for the State under the Constitution, as it now exists, to deny them that right on the theory that that may indirectly affect others. Although the proponents of this legislation—and practically all of the material in the fact brief comes from them—

assert the contrary, the fact is that the inevitable tendency of establishing minimum wages is to lower the maximum if the minimum is high enough to be effective and to displace women with men workers wherever men can be employed at comparable rates.

Whether it is better for society on the whole to adopt leveling processes and to take away the incentive to and the reward for industry and skill may be a subject for debate in the political forum. The question before the Court is whether constitutional guarantees may be stricken down to produce that result.

The direct object of the act is the fixing of wages for a group because of alleged inequalities in bargaining power. The language of this Court in the *Coppage* case is precisely apposite (*Id.*, pp. 17-18):

> "But the Fourteenth Amendment, in declaring that a State shall not 'deprive any person of life, liberty or property without due process of law', gives to each of these an equal sanction; it recognizes 'liberty' and 'property' as co-existent human rights, and debars the States from any unwarranted interference with either.
>
> "And since a State may not strike them down directly it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view. The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty."

The general concern of society for the welfare of its constituent members or of any group of such members is

not what is meant by the public interest which will justify an invasion of personal liberty under the police power. If it were, there would be no restraint or limitation whatsoever upon the law-making body except its own moderation, for it would always be for it to determine whether the public interest was sufficient to justify any proposed action. Of course the public is greatly concerned with the welfare of the workers, but it has no direct interest in the wages paid by A to B and a law prescribing the wages so as to be paid does not directly affect any public interest justifying the exercise of the police power. The end or object directly effected by such a law is private. The public interest, however great, is indirect. Unless that distinction be maintained, all constitutional limitations may be destroyed by the exercise of the police power in the sole judgment and discretion of the law-making body.

PART II.

Fundamental principles of valid legislative price-fixing are decisive in this case.

1. RULES GOVERNING PRICE-FIXING.

Minimum wage laws for women have three times been held unconstitutional by this Court in cases in which all aspects of minimum wage legislation were presented.

Adkins v. *Children's Hospital*, 261 U. S. 525.
Murphy v. *Sardell*, 269 U. S. 530.
Donham v. *West-Nelson Mfg. Co.*, 273 U. S. 657.

In *Adkins* v. *Children's Hospital*, supra, all state minimum wage laws in existence at that time were before the Court, and in *Murphy* v. *Sardell*, supra, many states having minimum wage laws intervened as amici curiae.

In no particular, material to the fundamental constitutional question, does the New York minimum wage law now before the court differ from the wage laws heretofore considered and passed on by the Court. All relate to the bargain between employer and employee and permit, either through direct legislative action or through a board or commission, the fixing by law of wages which an employee may receive or an employer may pay in the bargain between themselves, and they do not concern, regulate, or fix prices exacted from the public, either for property or services. All are alike in directly providing, with the force of law, the amount of money that A shall pay to B when they occupy to each other the position of employer and employee.

It is as to this uniform feature of all compulsory minimum wage laws that this Court, in interpreting the guarantee of liberty in the Fifth and Fourteenth Amendments, has uniformly and without exception, found that "the power of the State stops short of interference with what are deemed to be certain *indispensable requirements of the liberty* assured" by those Amendments. (Italics ours.) (*Near* v. *Minnesota*, 283 U. S. 697, 707-708.)

The decision in the *Adkins case*, and the decisions in the other cases dealing with similar wage-fixing laws which followed it, were based upon fundamental principles. They were concerned with the determination of what is meant by the "liberty" in the Constitution which may not be taken without due process of law and which may not be taken even upon the payment of just compensation. They rested upon the accepted and settled understanding of the "indispensable requirements" of that liberty, recognized and emphasized, not alone in those cases, but in a long line of decisions on the subject, marking the wide distinction, in the exercise of the "rate-making power" between fixing the rates which must be paid by the public and fixing the wages, not paid by the public, but agreed on in the purely private bargain which two persons, one desiring to work in the

ordinary occupations of the community and the other wishing such services in that occupation would be free to agree upon between themselves, but for legislative restraint.

In the many cases which have dealt with this subject of the "rate-making power", that is price-fixing or rate-fixing by law, from the earliest times to the present—whatever may be the twilight zone in which there may be doubt or debate,—there has consistently, and on fundamental grounds, been maintained the clearly marked constitutional difference between the rates or charges made to the public, on the one hand, and the rates or charges called wages, not made to the public, on the other hand.

This may be demonstrated by a consideration of the principles which run through all cases in this Court on the subject of the "rate-making" element of the Police Power.

A—*Freedom from price-fixing is the rule and not the exception.* This aspect of the exercise of the Police Power has been constantly emphasized in every expression on the subject by this Court from the earliest to the latest.

In *Patterson* v. *Bark Eudora*, 190 U. S. 169, Mr. Justice Brewer laid down the "proposition" that,

> "Generally speaking, every citizen has a right freely to contract for the *price* of his labor, services or property" (p. 174).

In an elaborate discussion of the subject in *Ribnik* v. *McBride*, 277 U. S. 350, this Court said (p. 357):

> "Under the decisions of this Court it is no longer fairly open to question that, at least in the absence of a grave emergency, the *fixing of prices* for food or clothing, of house rental, or of wages to be paid, whether minimum or maximum, is beyond the legislative power." (Italics ours.)

And with special reference to the liberty of the individual in the relation of employer and employee, Mr. Justice Harlan, speaking for the Court, in *Adair* v. *United States*, 208 U. S. 161, said in even more emphatic terms:

> "The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell. * * * In all such particulars the employer and employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land" (pp. 174-175).

B—*The desirability of price-fixing as a speedy remedy for supposed evils, and the difficulty of dealing with them by other methods, constitute no warrant for this interference with the "freedom of contract."*

In the case of *Hurtado* v. *California*, 110 U. S. 516, Mr. Justice Matthews used the following language, referring to the powers of the States under the Constitution:

> "But it is not to be supposed that these legislative powers are absolute and despotic, and that the Amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint * * * (p. 535).
>
> " 'It must be conceded', said this court, speaking by Mr. Justice Miller in *Loan Assn.* v. *Topeka*, 20 Wall. 655-662, 'that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlim-

ited control of even the most democratic depository of power, is after all but a despotism' " (p. 536).

In *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20, 37, Chief Justice Taft, delivering the opinion of the Court on the question of the constitutionality of the Child Labor Law, said:

> "The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards."

Mr. Justice Holmes, in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 394, referring to the protection of private property in the Fifth Amendment, said:

> "When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States * * * (p. 415).
>
> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change" (p. 416).

And more recently, referring particularly to price-fixing for personal services, this Court said (*Tyson & Bro.* v. *Banton*, 273 U. S. 418, 445):

> "But the difficulty or even the impossibility of thus dealing with the evils, if that should be conceded, constitutes no warrant for suppressing them by methods

precluded by the Constitution. Such subversions are not only illegitimate but are fraught with the danger that, having begun on the ground of necessity, they will continue on the score of expediency, and, finally, as a mere matter of course. Constitutional principles, applied as they are written, it must be assumed, operate justly and wisely as a general thing, and they may not be remolded by law-makers or judges to save exceptional cases of inconvenience, hardship or injustice."

And, again, *Ribnik* v. *McBride* (277 U. S. 350, 358):

"And we since have held definitely that the power to require a license for and to regulate the conduct of a business is distinct from the power to fix prices. 'The latter power is not only a more definite and serious invasion of the rights of property and the freedom of contract, but its exercise cannot always be justified by circumstances which have been held to justify legislative regulation of the manner in which a business shall be carried on.'

"To urge that extortion, fraud, imposition, discrimination and the like have been practiced to some, or to a great, extent in connection with the business here under consideration, or that the business is one lending itself peculiarly to such evils, is simply to restate grounds already fully considered by this Court. These are grounds for regulation but not for price fixing, as we have already definitely decided."

C—*Rate-making, being a taking of property for supposed public benefit, must comply with the requirements of just compensation.*

This has been expressed in numerous cases, but a few will illustrate the view of this Court.

In *Cotting* v. *Kansas City*, 183 U. S. 79, 91, the court said:

> "As to parties engaged in performing a public service, while the power to regulate has been sustained, negatively the Court has held that the legislature may not prescribe rates which, if in force, would amount to a confiscation of property."

In *Smyth* v. *Ames*, 169 U. S. 466, it was said (p. 547):

> "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."

In *Board* v. *N. Y. Telephone Co.*, 271 U. S. 23, it was said (p. 31):

> "The just compensation safe-guarded * * * is a reasonable return on the value of the property used at the time that it is being used for the public service. And rates not sufficient to yield that return are confiscatory."

In *West* v. *Chesapeake & Potomac Telephone Co.*, 295 U. S. 662, 671, it was said:

> "The established principle is that as the due process clauses (Amendments V and XIV) safeguard private property against a taking for public use without just compensation, neither Nation nor State may require the use of privately owned property without just compensation. When the property itself is taken by the exertion of the power of eminent domain, just compensation is its value at the time of the taking. So, where by legislation prescribing rates or charges the use of the property is taken, just compensation assured by these constitutional provisions is a reasonable rate of return upon that value."

D—*Price-fixing is justified only as a protection to the consuming and using public and the price regulated is the price paid by the public.*

When we speak of constitutional regulation of business by the fixing of prices charged because the business is "devoted to a public use", "affected with a public interest" or even of such a nature that "unrestricted competition is an inadequate safe-guard to the public" we are referring to the charges made to those who patronize the business, that is, the buying public. The protection of the public is required, and hence justified, because growing out of the relation of the business to the public, there is a tendency to or danger of monopoly, or there may be an undue and unintended advantage gained by the public grant, or there may be danger to the public in securing its supply, in unrestricted competition in a particular instance.

The charge to which we refer and the fixing of which is the method of protecting the public, is manifestly the charge made to the public, not the division between the partners, distribution among the stockholders, or the payments in the course of internal management of the business, or the production of goods or services which are sold to the public.

The very reasoning, therefore, which supports price-fixing, in the case of any public service in which the public is interested to such an extent as to require regulation of that particular kind, negatives the fixing of wages of employees in the bargain to which employer and employee alone are parties and to which bargain none of the criteria justifying rate-making can be applied.

In other words, if the business of conducting a grain elevator is to be considered as so far affected with a public interest or so affecting the public welfare that it may be regulated as to prices charged to and paid by the public, such a business cannot, by the same token, be regulated

to the extent of fixing the prices to be paid to the carpenter for putting up the building or the employee who shovels out the grain, persons who make no charge to the public for their services, but look solely to their employer, the only other party to the bargain. The two are obviously different in the constitutional sense; the one activity—allowing the use of the elevator to all who may wish to use it for a charge—is a public business in the sense that it is a business in direct relation with the public, in which the public has direct concern; the other is a private matter with which the public has no direct relation and cannot be directly affected or concerned.

This distinction is illustrated in a number of cases. Three may be mentioned.

In the case of *O'Gorman and Young* v. *Hartford Insurance Co.*, 282 U. S. 251, the fixing of the amount to be charged by insurance agents was upheld because it was but a part of the charge made to the public for the insurance, the insurance business being so far affected with a public interest that the rates could be fixed by law. It was not intimated in the majority opinion in that case that there was a right to regulate the wages and salaries of the employees of the insurance company as between the company and its employees having no direct dealings with the public.

In *Nebbia* v. *New York*, 291 U. S. 502, the Court sustained "price fixing" in the sale of milk to the public, but it was not intimated in that case that the milk dealer could have fixed for him by public authority the wages which he paid an employee in his store or that the employee might have fixed for him by law the amount he might charge his employer for his labor.

The basis of the court's decision is indicated in the following (p. 538):

> "If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate

safeguard of the *consumer's interest,* produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry *and to the consuming public.*" (Italics ours.)

From this it will be seen that the Court was dealing and meant to deal only with the relation of the business to the consuming public. Indeed, this is made even clearer by the reference in the *Nebbia case* to the decision in *Wolff Co.* v. *Industrial Court,* 262 U. S. 522, where the very distinction here pointed out was made and where the Court suggested that assuming that the business of preparing food could be said to be affected with a public interest there was no justification for fixing the wages of its employees.

And, in *Tagg Brothers* v. *United States,* 280 U. S. 420, the Court, while pointing out that the fixing of the charges that should be made by a business affected with a public interest could not be avoided by splitting the charge up between the charge to the public for the use of the stockyard and a separate charge to the public for the commission men using the same property "affected with a public interest", and engaged in an integral part of the same business, recognized the distinction here made by saying *"There is here no attempt to fix anyone's wages."*

2. THE BASIS FOR THE DISTINCTION BETWEEN WAGES OF EMPLOYEES AND RATES FOR THE USE OF PROPERTY IN CONSTITUTIONAL PRICE FIXING.

The results reached in these cases and in many others on this subject, are uniformly consistent with the vital dis-

tinction between property and labor in the manner of constitutional price-fixing; one is the taking of "property", the other is a taking of "liberty", both mentioned in the Constitution, and both protected by the constitutional guaranties, as rights; but the right of property and the right to liberty are essentially different in their nature and in the relation of the state to them. Property, however absolute and unqualified may be the title to it, originates from the state, and is held under the implied condition that its use shall not be injurious to an equal enjoyment by others having an equal right (*Holden* v. *Hardy*, 169 U. S. 366, 392, quoting Chief Justice Shaw in *Commonwealth* v. *Alger*, 7 Cush. 84).

In a sense, property is thus held at the will of the state and may revert to the state or even be taken by the state if the public need requires. But liberty is not held at the will of the state. It does not revert to the state, and it can not be taken by the state except as a punishment for crime or in time of war. The right of property is a conditioned right, but the right to liberty is a prerequisite to the very organization of a government such as ours. To secure it was the purpose of the organization of the government, and nothing is better settled in our constitutional law than that liberty does not mean merely freedom from physical restraint, but it includes the right to work for a living by using the powers of brain and muscle in the ordinary activities of mankind.

"It requires no argument", said Mr. Justice Hughes, in *Truax* v. *Raich*, 239 U. S. 33, 41, "to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the (Fourteenth) Amendment to secure."

Another attribute of property, not pertaining to liberty, is that property always has its equivalent in money or other thing of value. When property is taken for public

use, either by taking the property directly or by taking indirectly by diminishing the income from the property, this equivalent may always be given in return, and the constitutional requirement of "compensation" complied with. When the use of *property* is regulated by price fixing, the method by which this equivalent is secured has been carefully worked out in our system of government; we ascertain the fair value of the property devoted to the public use and allow an adequate return on this value, and thus avoid confiscation.

But liberty has no constitutional "equivalent in money", under our system of government.

So, when salaries or wages are fixed by law, there is no way to ascertain the capital investment and the adequate return. When a man devotes his brain and brawn to the earning of a livelihood, how is the Court to calculate a rate of return on the investment when nothing is invested which may be measured in dollars and cents? How can the Court fix six per cent. on brain power or six per cent. on the sweat of the brow and thus determine that there has been an adequate return, and hence no confiscation?

So, when the use of *property* is regulated by rate-making, the constitutional guaranty that property shall not be taken without just compensation may be fulfilled; but when wages are regulated by price-fixing, there can be no equivalent offered and the constitutional guaranty can not be fulfilled.

It follows from these differences that, just as property may be taken for public use, so by the manner of its use it may, under certain circumstances, be said to have been dedicated to a public use or devoted to a public use or used in such a way that the public has an interest in its use, and thus arises a right to fix rates; but, by like token, labor or personal services *can not* be said to be dedicated to a public use or devoted to a public purpose, whatever may be the manner in which they are used, and whether

the characterization of "public use" is by judicial reasoning or legislative declaration. This would be "running the public interest argument into the ground", as said by this Court in *Wolff* v. *Industrial Court*, 262 U. S. 522, 539, using the expression of Mr. Justice Bradley in the *Civil Rights Cases*, 109 U. S. 3, 24.

This thought, that working for wages can not be, in the very nature of things, said to be a business devoted to a public use, has been several times expressed by this Court. In *Ribnik* v. *McBride*, 277 U. S. 350, this Court reaffirmed its previous statement in *Wolff* v. *Industrial Court*, supra:

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation * * * (p. 356).
>
> "The public is deeply interested in all these things. The welfare of its constituent members depends upon them. The interest of the public in the matter of employment is not different in quality or character from its interest in the other things enumerated; but in none of them is the interest that 'public interest' *which the law contemplates as the basis for legislative price control*" (p. 357). (Italics ours.)

Again, in *Wolff* v. *Industrial Court*, 262 U. S. 522, 539, 540:

> "If, as, in effect, contended by counsel for the state, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. * * *

> It will be impossible to reconcile such result with the freedom of contract and of labor secured by the Fourteenth Amendment."

Any basis for legislative price control or the exercise of the rate making power, is wholly absent in the case of the relation of employer and employee between themselves, and not with the public—wherever the labor may be performed, in connection with whatever business it may be given, and regardless of the public interest.

The differences between "property" and "liberty" are expressly recognized in the Constitution itself. "Property" may be taken upon the payment of "just compensation". Liberty, including work for wages, in the relation of employee to the employer can not be taken at all, except by the due process of determining the commission of a crime for which punishment is provided.

These essential constitutional differences between "property" and "labor" in respect of their liability to or immunity from "price fixing" is not new or startling. It underlies all the decisions of this Court on the subject of the rate-making power. It determines the result in every case, and so it is that while regulation of the use of property by price fixing has always been sustained where (a) the property was devoted to a public use in which the public had an interest, because of direct dealings with the owner, and (b) "just compensation" in some form could be conceived, regulation of wages by price fixing has always been denied, whatever may have been the public interest, and whatever the reasonableness of the price fixed. (The fixing of fees as a condition to the granting of a bounty by the state and the stipulation of wages as a condition of work for the state are, of course, not really exceptions, but rather affirmances of the rule.)

3. REVIEW OF CASES ILLUSTRATING AND APPLYING THE DISTINCTION.

A review of the leading cases in this Court on the subject now under consideration will show that these distinctions are consistent with the conclusion in every single case, without exception.

Frisbie v. *United States,* 157 U. S. 160. (Regulation of Congress forbidding attorneys to receive more than a certain amount of prosecuting claims for pensions, held constitutional on the ground that the pension is a bounty, and the terms upon which it may be granted or withheld, are wholly within the discretion of Congress; at the same time affirming the doctrine that except for this right to control bounties from the government, every citizen has the right, free from legislative control, to fix the price for his labor and services.)

Holden v. *Hardy,* 169 U. S. 366. (Statute limiting the employment of workmen in under-ground mines, held constitutional solely on the ground that it was a provision for preserving the public health, the Court disclaiming any intention of holding that regulations not primarily for the public health but primarily to restrict employment, would be constitutional.)

Knoxville Iron Co. v. *Harbison,* 183 U. S. 13. (Regulation requiring the redemption of store orders issued in payment of wages; held constitutional on the ground that it primarily and directly affected the public morals and safety.)

Patterson v. *Bark Eudora,* 190 U. S. 169. (Regulation making it a misdemeanor to pay seamen wages in advance; held constitutional on the ground that it was a measure directly affecting public morals, and as in *Holden* v. *Hardy,* supra, not affecting in any way the amount of the wages.)

Adair v. *United States,* 208 U. S. 161. (Act making it a criminal offense for any railroad company to discharge an employee on the ground that he was a member of a

labor union; held unconstitutional on the ground that it was an interference with the freedom of employer and employee to fix the terms of employment, being related to that term (similar to the amount of wages) which has no direct relation to the health, safety or morals, but is intended to be primarily a restriction upon the terms for the mere purpose of imposing such restrictions.)

Muller v. *Oregon*, 208 U. S. 412. (Statute limiting the hours of labor of women; held constitutional on the ground that it was a public health regulation, and assuming that the interest of the state terminated with the hours of service, and amount of compensation would be left to the agreement of the parties.)

McLean v. *Arkansas*, 211 U. S. 539. (Regulation requiring coal to be measured for payment of miners' wages, before screening; held constitutional on the ground that it was a measure to prevent fraud and requiring honest weights and measures in the transaction of business; but affirming the freedom of the right, under the Fourteenth Amendment, to make contracts for the sale of labor and to carry on trade or business.)

Riley v. *Mass*, 232 U. S. 671. (State statute limiting the hours of labor in factories for women; held constitutional following *Muller* v. *Oregon*, supra.)

Smith v. *Texas*, 233 U. S. 630. (State statute prohibiting any person from acting as conductor on a passenger train without having for two years prior thereto worked as brakeman or conductor of a freight train; held unconstitutional affirming the doctrine that the liberty protected by the Constitution means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use the powers of mind and body in any lawful calling.)

Erie Railroad Co. v. *Williams*, 233 U. S. 685. (State statute requiring semi-monthly payment of wages of employees of certain specified industries, including railroads;

held constitutional as an exercise of police power to protect the public morals and safety, following *Knoxville Iron Co.* v. *Harbison*, supra, and *McLean* v. *Arkansas*, supra.)

Coppage v. *Kansas*, 236 U. S. 1. (State statute making it a misdemeanor for an employer to require an employee not to become a member of a labor union; held unconstitutional as legislative interference with a term of employment which was not directly and primarily for the public health, safety or morals, but affecting the term of the contract for the primary purpose of restricting that term.)

Miller v. *Wilson*, 236 U. S. 373. (Statute fixing maximum hours of labor for female workers; held constitutional as a health measure on the reasoning of *Muller* v. *Oregon*, supra.)

Bosley v. *McLaughlin*, 236 U. S. 385. (Statute limiting the hours of labor for women in certain employments, including hospitals; held constitutional as a health measure on the reasoning of *Muller* v. *Oregon*, supra.)

Truax v. *Raich*, 239 U. S. 33. (Arizona statute regulating the employment of aliens, and requiring that employers should employ not less than 80 per cent. qualified electors or native born citizens; held unconstitutional on the grounds that it was an interference with freedom of employment not directly relating to public health, safety or morals, and affirming the doctrine that the right to work for a living in the common occupations of the community is of the very essence of personal freedom that it was the purpose of the Fourteenth Amendment to secure.)

Wilson v. *New*, 243 U. S. 332. (Act of Congress, the "Adamson Law", requiring that the then existing wage scale should continue in force pending a great public emergency; held constitutional on the ground that the interference with private rights was permitted only when a failure to agree on wages would jeopardize the nation's welfare *and then only as a temporary measure* to meet a passing exigency, leaving the parties free to govern their relations by their own agreements after the specified time;

and affirming the doctrine that, "as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed on standard is *not subject to be controlled or prevented by public authority*".)

Bunting v. *Oregon*, 243 U. S. 426. (State law fixing hours of labor; held constitutional solely on the ground that it was an "hours of service" law in the interest of public health, and although some question of overtime pay was presented, the Court disclaimed any intention of holding that a wage fixing statute could be sustained.)

Adams v. *Tanner*, 244 U. S. 590. (State law affecting the fees to be charged by employment agencies; held unconstitutional on the same principles which govern the power to fix wages of employees.)

Adkins v. *Children's Hospital*, 261 U. S. 525. (Act of Congress, applying to the District of Columbia, authorizing the fixing of minimum wages for women in various employments in the District; held unconstitutional on the ground that it was a "wage fixing law, pure and simple", and thus violated the Fifth Amendment, although many of the businesses in which employment was regulated were businesses affected with a public interest, hotels, for example; and, after a review of all the leading authorities, that were cited against the contention that the law was invalid, stating that "in none of the statutes thus sustained was the liberty of employer or employee to *fix the amount* of wages the one was willing to pay and the other willing to receive interfered with.")

Wolff Co. v. *Industrial Court*, 262 U. S. 522. (Kansas statute creating a so-called "Industrial Court" for the purpose of providing compulsory arbitration between employers and employees in business affected with a public interest, and as a result of such arbitration, fixing the wages of employees; held unconstitutional so far as wage fixing was concerned, on the authority, principally, of *Ad-*

kins v. *Children's Hospital,* supra, and affirming the doctrine that "there is no authority of this Court to sustain such exercise of power in respect to those kinds of business affected with a public interest.")

Radice v. *New York,* 264 U. S. 292. (State law prohibiting employment of women in restaurants between the hours of 10 P. M. and 6 A. M.; held constitutional as a health measure; but affirming the doctrine of *Adkins* v. *Children's Hospital* that a wage fixing law would be unconstitutional.)

Murphy v. *Sardell,* 269 U. S. 530. (State law fixing directly minimum wages for women, and declaring the need of such law in the interests of public health and morals, held, in a memorandum opinion, unconstitutional as violative of the Fourteenth Amendment on the authority of *Adkins* v. *Children's Hospital,* supra, which concerned the Fifth Amendment.)

Tyson & Bro. v. *Banton,* 273 U. S. 418. (Certain sections of the New York Ticket Brokers Act declaring that the price for admission to theatres is a matter affected with a public interest, and forbidding resale of tickets by any broker at a price in excess of 50 cents above the price printed on the face of the ticket; held unconstitutional as violative of the Fourteenth Amendment, affirming the principle that price fixing for personal services, such as that of a broker, is not permissible as a general rule; that a declaration of the legislature that business affected with a public interest is not conclusive on the Court; that the admitted power to regulate in many other respects does not lead to the conclusion that regulation by price fixing may also be resorted to, as the exercise of police power generally may be quite distinct from the power to fix prices; and that the provision for fixing prices cannot be sustained merely as a measure of preventing fraud or extortion, and the difficulty or even impossibility of dealing with evils in any other way constitutes no warrant for suppressing them by methods precluded by the Constitution.)

Ribnik v. *McBride*, 277 U. S. 350. (State law requiring a license of and regulating the conduct of employment agencies, including the fixing of prices to be charged for services rendered by such employment agencies; held unconstitutional as violative of the Fourteenth Amendment so far as the price fixing features were concerned; and affirming the doctrine that the common callings could not be said to be "devoted to a public use", or "clothed with a public interest" in the sense "which the law contemplates as the basis for legislative price control"; and affirming that the wages of the butcher, the baker, the wood chopper, and the miner could not be fixed by state regulation, and adding that there is "no reason for applying a different rule in the case of legislation controlling prices to be paid for *services,*" rendered by the employment agency, the real estate broker, or the merchandise broker.)

Tagg Brothers v. *United States*, 280 U. S. 420. (Federal statute, Packers and Stockyards Act, regulating business of buying and selling livestock in interstate commerce at stockyards and authorizing the fixing of rates for the charges of stockyards and market agencies, held constitutional, the Court stating that the mere division of the stockyards services between the stockyards corporation and the market agencies does not deprive Congress of a power of regulation which it otherwise would have had, and that such a regulation was not an attempt to fix wages or limit any one's net income.)

The "liberty" of the citizen, protected in the Bill of Rights, means the right to work for a living in the ordinary occupations and professions, not themselves forbidden as dangerous to the public health, safety, morals or welfare; this right, like all exercises of liberty, must of necessity be restricted as to time, place and circumstance so as to be enjoyed consistently with like measure of right of his fellows making up the body politic; but it can not be valued by the State—no price may be set upon it, and called

or treated as the legal equivalent; and so it can not, like property, be taken, either wholly or partially, for use by the State, upon paying just compensation; for there is no yardstick to gauge either the title to the right, or its use, and the Bill of Rights never contemplated that there should be; only the individual, possessor of the right, may fix its worth, in his bargaining with his fellows having equal rights.

From these decisions therefore there may be deduced the proposition—indeed, for all practical purposes, the rule—which effectively disposes of the question of wage-fixing in all instances and which reconciles the conclusions reached in all cases on the subject, and, also the reasoning by which those conclusions are reached. This simple rule is that the legislative rate-making power extends to the use of property under certain circumstances and conditions; it does *not* extend at all to wages, certainly wages paid by an employer and not by the public (excluding of course, fees for securing bounty from the government, work for the government itself, and stipulations as to fees and wages in government contracts). The solid ground for this rule is to be found in the very nature of rights of property and rights of labor, as we conceive of them in our form of government, and the difference between the two, recognized and sanctioned in the very nature of the constitutional guaranties extended to each.

This rule has never been denied by the result reached in any decision of this Court. On the other hand, it is supported in the reasoning of all the cases where a comprehensive discussion of the subject has occurred.

No change has taken place since the decision in *Adkins* v. *Children's Hospital*, supra, which would warrant a reversal of the Court's position enunciated in those cases, that minimum wage laws are an unconstitutional infringement on the liberty of contract guaranteed in the Fifth and Fourteenth Amendments to the Constitution.

Decisions of this Court on the precise question since that time indicate a strengthening rather than a relaxing of this principle.

Murphy v. *Sardell*, supra.
Donham v. *West-Nelson Mfg. Co.*, supra.
Wolff Packing Co. v. *Court of Industrial Relations*, supra.
Fairmont Creamery Co. v. *Minnesota*, 274 U. S. 1, 10.
Tyson & Brother v. *Banton*, supra.
Radice v. *People*, supra.

Nor has any aspect of minimum wage laws developed which was not considered and determined in *Adkins* v. *Children's Hospital*.

The highest court of the State, construing its own laws, has found, as to the law now before this Court, "no material difference between the Act of Congress (considered in the *Adkins* case) and the act of the New York State Legislature", the difference being merely "in phraseology and not in principle."

Recently, on March 11, 1936, a three-judge Federal District Court in New Jersey held unconstitutional the minimum wage provision of the New Jersey statute* regulating the cleaning and dyeing trade, in *Kent Stores of New Jersey, et al.*, v. *Wilentz, Attorney General* (not yet reported), the Court saying:

> "The minimum wage provision, at least as at present drafted, does not meet the constitutional standard established by the United States Supreme Court under the due process clause of the Fourteenth Amendment."**

*Laws of N. J., 1935, Ch. 281.

**Quoted from U. S. Law Weekly, March 24, 1936, Vol. 3, No. 30, page 675.

CONCLUSION.

The question here is not one of discretion in determining the extent to which the legislative body may go in legislating for the public health, safety, morals or welfare *within* the police power. It is not a question of the reasonableness of the exercise of an admitted power. At the very base of the discussion is the question of the power to act at all. The question is whether the fixing of the price of labor is within the police power at all—not whether it is a proper exercise of that power.

It will not do to say that the fixing of prices is done as a "health measure" and that therefore it comes within the police power and the constitutional guaranties do not apply. By the same token it might be said that the mere existence of freedom of contract or private ownership of property, guaranteed by the Constitution, are themselves inimical to health, morals or safety and therefore the legislature has a wide discretion to restrict or eliminate them.

The question before the Court being one of *power*, because of the limitations upon legislative power in the constitutional guaranties, the statistics or opinions which induced the legislature to believe the law desirable, have no more controlling weight on the question than they would have on the question of the validity of a law requiring employers to hire none but union men or a law forbidding them to hire any but native born citizens.

In the business of earning a living, the right freely to choose among lawful ordinary employments and freely to bargain according to one's own estimation of the worth of his exertions of mind or body, is an inalienable right of citizens who are not wards of the state, and is of the essence of that "liberty" which it was the purpose of the Bill of Rights to secure. The denial of that right, however mild and benevolent that denial may be, is to make certain

free men and women wards of the state—a position wholly inconsistent with the guaranties of the Constitution, extended to all.

Respectfully submitted,

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APPENDIX A.

THE PEOPLE OF THE STATE OF NEW YORK ex rel.
JOSEPH TIPALDO,

Appellant,

against

FREDERICK L. MOREHEAD, as Warden of the City Prison in the Borough of Brooklyn,

Respondent.

CRANE, Ch. J.: The appellant is the manager of a laundry establishment operating in the borough of Brooklyn. Together with three other individuals he was indicted by the grand jury of Kings county for the violation of the Minimum Wage Law for Women (Laws of 1933, ch. 584, in effect April 29, 1933). He was charged with the crime of paying to an adult woman employee a wage less than that promulgated by the Industrial Commissioner as the mandatory minimum wage applicable to such a woman engaged in that employment, in violation of section 565, subdivision 2, of the Labor Law (Cons. Laws, ch. 31). By this habeas corpus proceeding the relator seeks to test the legality of his arrest and imprisonment, raising as the only question before the court the constitutionality of the statute; for the violation of which he has been held for trial. His contention is that the law contravenes the Fourteenth Amendment of the Constitution of the United States, and article I, section 6, of the Constitution of the State of New York, both of which provisions are the same in this particular.

Chapter 584 of the Laws of 1933, thus attacked, is entitled, "An Act to amend the labor law, in relation to the determination and establishment of minimum fair wage

standards for women and minors, with provision for the imposition of penalties for the violation thereof." The applicability of the law as to minors is not questioned. The act provides the machinery for determining the minimum wage to be paid women in "an industry, trade or business or branch thereof or class of work therein in which women or minors are gainfully employed, but shall not include domestic service in the home of the employer or labor on a farm." (Labor Law, § 551, subd. 6.) The act defines "an oppressive and unreasonable wage" (§ 551, subd. 7) to be a wage which is both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health. "A fair wage" (subd. 8) shall mean a wage fairly and reasonably commensurate with the value of the service or class of service rendered. In establishing the fair minimum wage the Commissioner and the wage board may take into account (1) all relevant circumstances affecting the value of the service or class of service rendered; (2) may be guided by like considerations as would guide a court in a suit for the reasonable value of service rendered where services are rendered at the request of an employer without contract as to the amount of the wage to be paid; and (3) may consider the wages paid in the State for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards.

Section 552 reads as follows: "It is hereby declared to be against public policy for any employer to employ any woman or minor in an occupation in this state at an oppressive and unreasonable wage as defined in section five hundred and fifty-one of the article and any contract, agreement or understanding for or in relation to such employment shall be null and void."

The rest of the act provides for the establishment of a wage board, for hearings, for the determination of the

minimum wage, and for the directory order of the Commissioner regarding the payment thereof.

Section 565, subdivision 2, for violation of which the relator has been indicted and imprisoned, reads as follows: "Any employer or the officer or agent of any corporation who pays or agrees to pay to any woman or minor employee less than the rates applicable to such woman or minor under a mandatory minimum fair wage order shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than fifty nor more than two hundred dollars or by imprisonment of not less than ten nor more than ninety days or by both such fine and imprisonment, * * *."

We do not see wherein this act differs materially from the act of Congress ruled upon in *Adkins* v. *Children's Hospital* (261 U. S 525), wherein it was held that the Minimum Wage Act of September 19, 1918, chapter 174 (40 U. S. Stat. 960), was an unconstitutional interference with liberty of contract. The interpretation of the Federal Constitution by the United States Supreme Court is binding upon us; we are in duty bound to follow its decisions unless they are inapplicable. We find no material difference between the act of Congress and this act of the New York State Legislature. The act of Congress, it is said, was to protect women from conditions resulting from wages which were inadequate to maintain decent standards of living. The Attorney-General's brief states it in these words: "The purpose of the statute in the *Adkins* case was to guarantee a wage based solely upon the necessities of the workers. The statute did not provide for the wages to have any relationship to earning power; was applicable to all vocations and not to the character of the work. * * * As contrasted with this statute, the New York Minimum Wage Law provides a definite standard for wages paid. It provides that the worker is to be paid at least the value of the services rendered."

This is a difference in phraseology and not in principle. The New York act, as above stated, prohibits an oppressive and unreasonable wage, which means *both* less than the fair and reasonable value of the services rendered *and* less than sufficient to meet the minimum cost of living necessary for health. The act of Congress had one standard, the living wage; this State act has added another, reasonable value. The minimum wage must include both. What was vague before has not been made any clearer. One of the elements, therefore, in fixing the fair wage is the very matter which was the basis of the congressional act. Forcing the payment of wages at a reasonable value does not make inapplicable the principle and ruling of the *Adkins* case.

The distinctions between this case and the *Adkins* case are differences in details, methods and time; the exercise of legislative power to fix wages in any employment is the same. We should follow the law as given, and not speculate as to the changes which have come or are supposed to have come to economic conditions in the last decade which may move the Supreme Court to a further consideration of its ruling. The *Adkins* case has not been lightly passed over nor its rulings forgotten. It was cited and followed in *Wolff Packing Co.* v. *Court of Industrial Relations* (262 U. S. 522); *Murphy* v. *Sardell* (269 U. S. 530); *Tyson & Brother* v. *Banton* (273 U. S. 418); *Donham* v. *West-Nelson Mfg. Co.* (273 U. S. 657); *Ribnik* v. *McBride* (277 U. S. 350), and *Near* v. *Minnesota* (283 U. S. 697).

When minimum wage laws somewhat similar to our own have been challenged since the *Adkins* case the courts have felt bound by that decision to declare them unconstitutional without re-examination of the principles involved in these particular statutes. (*Topeka Laundry Co.* v. *Court of Industrial Relations*, 119 Kan. 12; *Folding Furniture Works, Inc.*, v. *Industrial Commission*, 300 Fed. Rep. 991;

Stevenson v. *St. Clair,* 161 Minn. 444; cf. *Holcombe* v. *Creamer,* 231 Mass. 99.)

The order below should be reversed, the writ sustained, and the prisoner discharged, as chapter 584 of the Laws of 1933, under which he is held, is unconstitutional according to *Adkins* v. *Children's Hospital* (261 U. S. 525).

LEHMAN, J. (dissenting): The appellant is held in custody under an indictment. By writ of habeas corpus proceedings he challenges the legality of his commitment. The indictment charges, we are told, that the appellant, as manager of the Spotlight Laundry, disobeyed a mandatory order, issued by the Industrial Commissioner under article 19 of the Labor Law (Cons. Laws, ch. 31), commonly known as the minimum wage law for women and minors (Laws of 1933, ch. 584) "prescribing certain minimum wages for certain adult women employees of the said laundry;" and that the appellant "conspired to make false entries in the time book of the said laundry for the purpose of making it appear that the said adult women employees did in fact receive the amount of wages," ordered to be paid by the Industrial Commissioner. The wrong charged in the indictment finds its roots in the statute, and the appellant attacks the statute as unconstitutional and void. The State raises no objections to the form of the attack. It concedes that the appellant's detention is lawful only if the statute is constitutional. That is the only question presented upon this appeal.

Minimum wage laws, *i. e.*, laws which require employers to pay to women and children employed by them a wage which shall not fall below a fixed minimum amount, have been enacted by many foreign countries; and, in the United States, sixteen States have enacted such statutes. So, also, the Congress of the United States in 1918 provided for the fixing of minimum wages for women and children in the District of Columbia. (40 U. S. Stat. 960, ch. 174.) Such a statute constitutes a restriction on freedom of contract

protected by the Fifth and Fourteenth Amendments of the Constitution of the United States. On that ground, the Supreme Court of the United States in *Adkins* v. *Children's Hospital* (261 U. S. 525), decided that the provisions of the Federal statute, there challenged at least in so far as they applied to adult women, violated the constitutional limitation upon legislative power. We are told that under that decision and for the same reasons which induced the Supreme Court to declare the Federal statute unconstitutional, we are bound to declare the New York statute void and unconstitutional.

There can be no doubt that the determination in that case that the Federal statute transcended the legislative power of Congress over the District of Columbia, made futile further argument that the statutes enacted by the various States, which were open to the same objections, should be sustained by the courts of those States. The Supreme Court of the United States must construe the provisions of the Constitution and its definition of inviolate rights guaranteed by the Constitution and of the division or restriction of powers thereunder must be accepted by all other courts of the country. A State court may previously have decided the same question. Such decision is of no effect after the Supreme Court of the United States has construed otherwise the Constitution which binds all, and when the same question arises again in a State court it must follow the decision of the Supreme Court regardless of its own opinion. (*Topeka Laundry Co.* v. *Court of Industrial Relations*, 119 Kan. 12; *Stevenson* v. *St. Clair*, 161 Minn. 444. Cf. *Sparks* v. *Moritz*, 141 Wash. 417.) The effect of the decision, there, is not measured by the persuasive force of the arguments which support it; for under any system of orderly administration of the law, it is the function of the court of last resort to pass finally upon the cogency of conflicting arguments and the weight of conflicting considerations. The effect is not

measured by the unanimity or lack of unanimity of the court, for the decision by a majority of one becomes the decision of the court. So Mr. Justice HOLMES, who dissented forcibly in the *Adkins* case, bowed to the decision as a precedent and concurred on that ground alone in later decisions of similar purport. (*Murphy* v. *Sardell*, 269 U. S. 530. Cf. *Donham* v. *West-Nelson Mfg. Co.*, 273 U. S. 657.)

That does not mean, of course, that a court of last resort may not reconsider the same question when it is again presented, and then reach a contrary conclusion. In the light of wider experience, broader information or changed conditions, the weight that should, reasonably, be given to conflicting considerations may change and error may become manifest. A Constitution may be amended only in manner provided therein, but a court which under the Constitution is charged with the duty of construing the Constitution may change its construction when convinced of error. That courts have not been willing to perpetuate a construction after they have been convinced of its unsoundness, has been a source of strength to our system of constitutional government. The Attorney-General, upon this appeal, argues that the statute now under consideration is free from the objections to the earlier "Minimum Wage" legislation, which the Supreme Court, in the *Adkins* case, held to be in violation of the provisions of the Constitution; but urges, also, that time and experience have demonstrated the soundness of the dissenting opinions there, and that the Supreme Court would now decide differently if the same objections were now presented. What the Supreme Court would now decide rests purely in conjecture, and even though we should assume that a court might under any circumstances properly base decision upon such conjecture, we should certainly hesitate to venture upon such an uncharted and treacherous sea. We start our consideration of the validity of the statute here challenged upon the assumption that the construction placed upon the

Constitution by the decision of the Supreme Court in the *Adkins* case is open to attack only in that court. Our personal views of the soundness of that construction then become irrelevant, except in so far as they might, perhaps even unconsciously, dictate our conclusion as to how far such construction should be carried.

Article 19 of the Labor Law, which the appellant now attacks, provides, in section 552 that "It is hereby declared to be against public policy for any employer to employ any woman or minor in an occupation in this state at an *oppressive and unreasonable wage* as defined in section five hundred and fifty-one of the article and any contract, agreement or understanding for or in relation to such employment shall be null and void." The definition contained in section 551 is "' an oppressive and unreasonable wage' shall mean a wage which is *both* less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health" (subd. 7). (Italics are ours throughout this opinion.) The same section defines "a fair wage" as "a wage fairly and reasonably commensurate with the value of the service or class of service rendered" (subd. 8). The statute then provides for the manner in which a "minimum fair wage" shall be fixed in occupations where "any substantial number of women or minors * * * are receiving oppressive and unreasonable wages as defined in section five hundred and fifty-one" (§ 554) and the manner in which employers in such occupations may be induced or compelled to pay the "minimum fair wage" so fixed.

The statute is unquestionably a "price fixing" statute. Ordinarily the price paid for labor, like the price to be paid for goods, is determined by agreement of the parties primarily concerned. The right by agreement to fix prices, whether of labor or goods, is part of the freedom of which no person may be deprived without "due process of law." The attack upon the statute is directed mainly to the point that the State violates this constitutional guaranty when-

ever it attempts to fix a fair wage for adults who are fully competent to enter into contracts fixing wages at a price which they are willing to accept, rather than reject employment offered to them at such wages. Inextricably interwoven in that attack are objections based upon the method of fixing "minimum fair wages" and the effect of the enforcement of payment of such wages as provided in this statute. We postpone analysis of the provisions for fixing the "minimum fair wage" and for enforcement of payment, until we have determined the extent of the power of the State to interfere in any form or manner with the free exercise of the right by adults of competent mental ability to fix wages by contract.

"There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. Whether these circumstances exist in the present case constitutes the question to be answered." (*Adkins* v. *Children's Hospital, supra*, p. 546.) Thus in the case upon which the appellant here relies, it was authoritatively held that the State under *exceptional* circumstances may place some restraint upon freedom of contract. The difference of opinion in the court concerned only the question of whether the circumstances were so exceptional as to justify, reasonably, the restraints imposed.

The general rules which govern consideration of the validity of a statute which restricts liberty of contract are, indeed, too well established to be challenged now. Liberty of contract is "subject to restrictions passed by the legislative branch of the Government in the exercise of its power to protect the safety, health and welfare of the people." (*McLean* v. *Arkansas*, 211 U. S. 539, 547.) "The guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and sub-

stantial relation to the object sought to be obtained." (*Nebbia* v. *People,* 291 U. S. 502, 525.) Liberty to fix by contract the price of labor does not differ in its nature from liberty to fix other terms and conditions of employment though, it may be conceded, that restriction there may encroach more seriously upon the essentials of our economic competitive system. Thus, perhaps, circumstances which might reasonably justify restrictions upon contracts in matters less vital might be insufficient here. Here, too, however, there are many instances where the State has been justified in imposing restrictions under its reserved police power to legislate for the general welfare. The difference then is, at most, one of degree. "Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other." (*Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 439.) It is with the background of these general rules that we must analyze the provisions of article 19 of the Labor Law now challenged.

The Legislature in section 550 of that article has set forth the conditions which in its opinion called for the exercise of the reserved power of the State: "The employment of women and minors in trade and industry in the state of New York at wages unreasonably low and not fairly commensurate with the value of the services rendered is a matter of grave and vital public concern. Many women and minors employed for gain in the state of New York are not as a class upon a level of equality in bargaining with their employers in regard to minimum fair wage standards, and 'freedom of contract' as applied to their relations with their employers is illusory. Since a very large percentage of such workers are obliged from their week to week wages to support themselves and others

who are dependent upon them in whole or in part they are, by reason of their necessitous circumstances, forced to accept whatever wages are offered them. Judged by any reasonable standard, wages are in many cases fixed by chance and caprice and the wages accepted are often found to bear no relation to the fair value of the service rendered. Women and minors employed for gain are peculiarly subject to the overreaching of inefficient, harsh or ignorant employers and under unregulated competition where no adequate machinery exists for the effective regulation and maintenance of minimum fair wage standards, the standards such as exist tend to be set by the least conscionable employers. In the absence of any effective minimum fair wage rates for women and minors, the constant lowering of wages by unscrupulous employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers and threatens the stability of industry. The evils of oppressive, unreasonable and unfair wages as they affect women and minors employed in the state of New York are such as to render imperative the exercise of the police power of the state for the protection of industry and of the women and minors employed therein and of the public interest of the community at large in their health and well-being and in the prevention of the deterioration of the race. In the considered judgment of the legislature this article is constitutional."

The appellant does not challenge these findings of fact by the Legislature, nor does he challenge the statements in the "factual brief" submitted by the respondent to sustain and amplify these findings. Though no reasonable man, today, can doubt the mental capacity of women and though, happily, in this country there are few vestiges of the ancient law which discriminated between men and women and incapacitated women from entering upon independent industrial, business or professional careers, yet it is notorious that in the free competition of such careers they

are at a disadvantage with men. The reason may be found in ancient prejudice, in custom, in training or in physical difference. Whatever may be the reason the fact is patent that often women are willing or forced to accept lower compensation for service than men receive in the same occupation. If wages constitute a "fair and reasonable value of the services rendered," perhaps it would be arbitrary to require an employer to pay more even though such wages be "less than sufficient to meet the minimum cost of living necessary for health." (Cf. *Adkins* v. *Children's Hospital, supra.*) If wages are *both* less than the "fair and reasonable value of the services rendered" *and* less than sufficient to meet the minimum cost of living necessary for health, some element of inequality or oppression may reasonably be found to enter into the bargain.

From wages so fixed a vicious chain of results may follow. The health of the underpaid women suffers, or they must become a burden upon their families or communities. That is a matter which is certainly of public concern and which might well engage the attention of the Legislature. It is clearly unjust that an unscrupulous employer should obtain the services of his employees upon payment of wages "less than the * * * value of the services rendered" and that the community should bear the burden of his cupidity. True, not all employers who pay such inadequate wages are unscrupulous. In unrestrained competition an employer can seldom afford to increase his costs beyond those paid by his competitors. Thus if in any occupation a considerable number of persons are employed at "oppressive and unreasonable wages" by those willing to profit by the weakness of their employees, more scrupulous employers may be driven to pay the same wages. Competition, however desirable generally, becomes unfair when one employer by the use of practices which, though not unlawful, are unjust and injurious to his employees or to the public, can force his competitors to the wall or compel them to avail themselves of the same practices. It has been held

in many cases that under such circumstances the Legislature may, within proper limits, restrain such practices. That is in the interest of proper competition.

The vicious result of oppressive wages does not stop even with the underpaid wage earner. It extends throughout the industry and in lesser degree even beyond the industry. Labor which for one reason or another is deficient in bargaining power has come to be known as "cheap labor," that is, labor which fails to obtain wages commensurate with the value of the services rendered. Just as experience has shown that, in a community where peonage or slavery exists, free labor cannot flourish, so in an industry, or even community, where oppressive wages are paid to those deficient in bargaining power, it is not unreasonable to believe that such wages affect indirectly but nevertheless very substantially the wages of all others. At least the Legislature might so find. It cannot then be gainsaid that the conditions which the Legislature found to exist call for some remedy. Indeed, the appellant does not seriously argue otherwise. The real question here presented is whether the remedy applied is reasonable and complies with the requirements of "due process," as defined by the Supreme Court, without which there may be no restriction upon liberty of contract.

Here we may profitably examine the prevailing opinion in *Adkins* v. *Children's Hospital* (*supra*) to determine whether the statute now under consideration is subject to the objections which dictated the conclusion of the court in that case. In that case the statute provided for the fixing of standards of minimum wages for women in any occupation adequate "to supply the necessary cost of living to women workers * * * to maintain them in health and to protect their morals." No other standard was there prescribed. It was there said that "while the physical differences [between men and women] must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we

cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances" (p. 553). We accept that statement with all its implications.

The Legislature has then no greater power to restrict the liberty of women than of men. All are equally entitled to the protection of the law, and, in regard to all, liberty of contract is the rule, and restriction can be justified only by exceptional circumstances. What was said by the court can mean only that. None the less, just as in legislation in relation to health, the physical differences between men and women may properly be taken into account so in legislation in other fields, the Legislature cannot reasonably be required to disregard actual conditions which affect women differently from men. The test in each case is whether the conditions justify the remedy regardless of whether those conditions affect men or women. Classification must of course be based upon actual conditions, not outworn theories of sex inferiority or superiority. In the *Adkins* case the question was whether the Legislature could require an employer to pay minimum wages to women sufficient to maintain them in good health and to protect their morals, regardless of the value of the service rendered. The court held that such a requirement is unreasonable in its nature and not justified because it is confined to women. In this case the question is whether employers can be compelled to pay women wages which are not "oppressive." There is here no contention that the legislation is justified on the ground that the Legislature may restrict the liberty of women where it could not restrict the liberty of men. The Legislature has found that women are not "*as a class* upon a level of equality in bargaining with their employers in regard to minimum fair wage standards, and 'freedom of contract' as applied to their

relations with their employers is illusory" (§ 550). Undoubtedly there is ground for the belief that women are paid less than men in most occupations. That groups of men may also be paid "oppressive" wages may be entirely true. Perhaps they, too, should be protected by similar legislation. Upon that question we are not now called upon to pass. It is sufficient to point out that here the Legislature has not unlawfully discriminated between groups or sexes. Since it might reasonably be found that in the unrestrained play of economic forces, women as a class are at a disadvantage, with resultant injury to the general welfare, the Legislature might in its discretion adopt legislation, confined to them, which is reasonably adapted to meet the conditions peculiarly affecting them. The distinction is not based upon assumed need to protect the health or morals of women but upon the need of protecting the public against the evil of "oppressive" wage contracts imposed upon women because of economic conditions peculiarly affecting women. So in this case, as in the *Adkins* case, the fundamental question is whether the remedy is reasonable and appropriate.

In the *Adkins* case the court said that the law forbids "two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequence may be to oblige one to surrender a desirable engagement and the other to dispense with the services of a desirable employee" (p. 554). That criticism might be applied to the earlier statute; it has no application here, for, as we have shown, the Legislature might reasonably find that acceptance of a contract for wages less than the reasonable value for services rendered and less than the minimum cost of healthful living must from its nature be induced by the necessities of the wage earner rather than by any opinion that the employment is "desirable." Then

the court said: "the price fixed by the board need have no relation to the capacity or earning power of the employee, the number of hours which may happen to constitute the day's work, the character of the place where the work is to be done, or the circumstances or surroundings of the employment; and, while it has no other basis to support * * * the necessities of the employee, it takes no account of any independent resources she may have" (p. 555). Again, this objection does not apply to the statute now challenged. It has, as we have shown, other basis than the "necessities of the employee." Its basis is rather that wages which bear no fair relation "to the capacity or earning power of the employee, the number of hours which may happen to constitute the day's work, the character of the place where the work is to be done, or the circumstances or surroundings of the employment;" in other words, relation to all those conditions might enter into the measure of fair compensation for the value of services, are not fair wages; and when in addition, they are insufficient to maintain the health of the employee, such wages are detrimental to the general welfare.

The next source of invalidity in the *Adkins* case is the uncertainty of the standard to be applied in fixing the minimum wages which must be made. There the formula to be applied was the "necessary cost of living to women workers to maintain them in health and to protect their morals." Here the formula to be applied *in fixing wages* is that of "a fair wage" as defined by the statute, *i. e.*, "a wage fairly and reasonably commensurate with the value of the service or class of service rendered" (§ 551, subd. 8). The necessities of the employee do not enter into that standard. True, under the statute, jurisdiction to fix fair wages is made dependent upon a finding that the wages paid to a substantial number of women or minors is "less than * * * the minimum cost of living necessary for health" (§ 551, subd. 7), but even though, as the Supreme Court has pointed out, the necessary cost of living is not "a

precise or unvarying sum," yet obviously there must be a point where determination with reasonable certainty is possible that wages paid are *less* than the necessary cost of living to maintain a woman in good health. Thus the objection to the standard in the statute considered in the *Adkins* case has no application here. We postpone consideration whether similar objections might be raised to the standards to be applied under the present statute until after we have completed analysis of the objections set forth in the opinion in the *Adkins* case.

It is further said in that opinion that "the law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss. * * * It compels him to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee. It therefore undertakes to solve but one half of the problem. The other half is the establishment of a corresponding standard of efficiency, and this forms no part of the policy of the legislation, although in practice the former half without the latter must lead to ultimate failure, in accordance with the inexorable law that no one can continue indefinitely to take out more than he puts in without ultimately exhausting the supply. * * * To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole" (p. 557).

Here we reach the crux of the objections which, in the opinion of the Supreme Court, rendered the earlier statute arbitrary and unreasonable and here, too, it is evident that the Legislature, in the new statute, recognized these objections and sought to provide a remedy which should be free from them. Assuming that it is possible to measure, in accordance with the provisions of the statute, the "value of the service or class of service" rendered, it is clear that a requirement that the employer shall not be permitted to pay less than such value does not "compel the employer to pay a sum which the employee is not capable of earning," nor can it fairly be said that the law compels payment irrespective of the ability of the business to bear the burden, for with the exception perhaps of a business which can exist only through practices which are unfair and economically unsound, a business must ordinarily be able to bear the burden of paying fair compensation for service given to the business. An employer who pays wages less than that, and less than the cost of healthful living, places upon society the burden of paying part of the legitimate costs of the business.

That these differences are vital appears from the opinion itself in the *Adkins* case, for it continues: "The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do. The declared basis, as already pointed out, is *not the value of the service rendered*, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals" (p. 558). The exact opposite is true in this case. "The moral requirement implicit in every contract of employment, viz., that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is

completely ignored'' in the earlier statute. It is not ignored here. Indeed what the statute aims to do is to declare that ''the moral requirement implicit in every contract of employment'' cannot be excluded by agreement of parties where through such exclusion the general welfare may suffer. Indeed, the court went further in the *Adkins* case and expressly pointed out that a statute like the one under consideration might not be subject to the objections there held insuperable, saying: ''A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, *to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service,* would be understandable. But a statute which prescribes payment without regard to any of these things and solely with relation to circumstances apart from the contract of employment, the business affected by it and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States'' (p. 559).

We have assumed, so far, that the provisions for fixing wages are fair and provide a standard which can be applied by administrative officers. That assumption must now be tested by analysis of the statute itself. The statute does not require that every employer shall pay a minimum ''fair'' wage, nor that at his peril and to avoid criminal prosecution, any employer must determine what is a ''fair'' wage. An employer must pay such a wage only where such a wage has been fixed for a particular service or class of service in a particular industry by administrative order, and where a further order has been made requiring employers in that industry to pay the minimum wage so fixed. Such an order may be made only when, on the basis of information in the possession of the Industrial Commissioner or the Director of the Minimum Wage Bureau, the Commissioner is of opinion that ''any substantial number

of women or minors in any occupation or occupations are receiving oppressive and unreasonable wages as defined in section five hundred and fifty-one." Even then he may not proceed summarily to make an order fixing wages, but must "appoint a wage board to report upon the establishment of minimum fair wage rates for such women or minors in such occupation" (§ 554).

The Minimum Wage Board must be composed of not more than three representatives of the employers in any occupation or occupations, an equal number of representatives of the employees in such occupation or occupations and not more than three disinterested persons representing the public. "Within sixty days of its organization a wage board shall submit a report including its recommendations as to minimum fair wage standards for the women or minors in the occupation or occupations the wage standards of which the wage board was appointed to investigate." (§ 555, subd. 4.) That means "a wage fairly and reasonably commensurate with the value of the service or class of service rendered. In establishing a minimum fair wage for any service or class of service under this article the commissioner and the wage board without being bound by any technical rules of evidence or procedure (1) may take into account all relevant circumstances affecting the value of the service or class of service rendered, and (2) may be guided by like considerations as would guide a court in a suit for the reasonable value of services rendered where services are rendered at the request of an employer without contract as to the amount of the wage to be paid, and (3) may consider the wages paid in the state for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards" (§ 551, subd. 8).

It is said that the standard of fair value of services is too indefinite for accurate application. It is true that value is ordinarily determined by competitive agreement,

and here, it is plain, the Board is required to fix a value different from the value fixed by such agreement. Courts and juries are at times required to fix values when there is no market price, and many price-fixing statutes have been sustained in occupations affected by a public interest, though there, too, the same difficulty may exist. The difficulty is met if some reasonable basis exists for fixing wages. Before a report of the Wage Board becomes effective there must be a public hearing, and only when the Commissioner, after such hearing, has approved, can any order be made fixing the "fair wage." (§§ 556 and 557.) Even then the order remains only directory for nine months. It can be made mandatory thereafter, but only upon a new public hearing. (§ 560.) At any time after an order fixing such wages, whether directory or mandatory, has been in effect a year, there must be a reconsideration of the wage upon the petition of fifty or more residents of the State. (§ 561.) In addition there is a "right of review by the industrial board, and the courts from any ruling or holding on a question of law included or embodied in any decision or order of the commissioner or the director" (§ 563), and upon such review the reasonableness of any rule or order may be challenged. (Labor Law, art. 3.)

An order so made seems to comply in all respects with constitutional requirements. The Legislature has set a standard which must guide the administrative officers. Though the standard cannot be applied mechanically, it is sufficient in most cases to admit of conclusions reasonably drawn from the evidence presented and which can be tested by application of rules of reason. The statute provides a hearing to all persons affected and a judicial review of the reasonableness of the conclusions drawn. There may, quite possibly, be exceptional cases where no evidence can be produced, from which any conclusion can logically be drawn. Then any person may attack the reasonableness of the finding. No such attack is here made, and an

examination of the report of the Wage Board shows ample evidence to support its conclusion.

Doubtless, in the application of the statute, hardship to individuals may at times arise. Argument may be made that economic wrongs are best corrected by the free play of economic forces. Doubtless that consideration has dictated the conclusion of the courts in many cases where statutes restricting competition have been declared unconstitutional. Our economic system is based upon competition, and when we say liberty of contract is the rule and restriction can be justified only by exceptional circumstances, we probably mean just that. None the less, restrictions within reasonable limits and upon reasonable grounds are justified, and so long as the Legislature does not exceed those limitations it must determine whether the price that must be paid for restrictions is justified by the results that may reasonably be expected from such restrictions. It is said that if the court permits the fixing of minimum prices, it must also permit the fixing of maximum prices. The problem is not so simple. We hold only that in this case the Legislature might reasonably fix minimum prices for women because within the limited field covered by the statute some employers have taken advantage of the economic weakness of women to the public injury. Competition there, it has been found, has been at times illusory, and at times unfair and has worked injury to the general welfare. Whether a law fixing maximum prices could ever be justified by circumstances so compelling as to render the law reasonable is not involved. Price fixing by free contract must remain unrestrained so long as it does not injure the public welfare. In each case the test is whether the restriction is justified and in conformity to "due process."

Here, it may be interesting to observe that in this case no employer or employee has challenged the fairness of the wage fixed or claims it may result in injustice. The Wage Board agreed unanimously upon the amount of a

fair wage in the laundry industry. No person appeared at the public hearings to object to the wage so fixed. No person sought a review of the order by appeal to the Industrial Board. The order has been in force for several years and there has been no application for a reconsideration. Even upon this appeal, a brief in support of the law has been filed by a trade association of owners of laundries, and the only person attacking the law is the appellant who has been charged with concealment by false entries of disobedience of the law. In such circumstances it can hardly be said that, at least in so far as concerns the laundry business, the statute or the wage fixing order is unfair or unreasonable. When orders are issued fixing wages of women in other occupations the courts may be called upon to decide whether they are reasonable and justified by the evidence.

We are told that this statute, though enacted primarily for the protection of women, may eventually result in injury to them; for some employers may prefer to employ men if they can obtain male employees for less wages than the law requires for women employees. That adult male employees of equal efficiency can be obtained at less than the minimum wage fixed for women and minors is contrary to common experience and contrary to the findings of the Legislature. Under these circumstances, that objection is one which the Legislature might reasonably disregard. If in truth it should appear that any substantial number of men have because of price fixing orders supplanted women in any industry, that might be convincing evidence that the orders were unreasonable. No such contention has been made by the appellant.

We are further told that such orders may work hardship to industries in some districts. The statute has provided against that. "5. A wage board may differentiate and classify employments in any occupation according to the nature of the service rendered and recommend appro-

priate minimum fair rates for different employments. A wage board may also recommend minimum fair wage rates varying with localities if in the judgment of the wage board conditions make such local differentiation proper and do not effect an unreasonable discrimination against any locality." (§ 555.)

It is argued that the differentiation is permissive, not mandatory. That may be true, but a permissive right to differentiate becomes mandatory where failure to exercise it would be unreasonable. There as elsewhere the judgment of the Board is subject to judicial review.

We have considered all the objections urged by the appellant or which have occurred to us, though perhaps the consideration of some of these objections rests exclusively with the Legislature. Doubtless some persons may suffer hardship. There may be some women replaced by other women of greater efficiency. Some businesses, which are economically unsound, may be discontinued. Such individual hardships may be the result of any restriction upon competition, but greater hardships of the same kind may be the result also of unrestrained competition, especially where that competition is tainted with overreaching or other unfair practices. The Legislature doubtless weighed these objections, they are not so weighty that a court should say the Legislature could not reasonably find that they are over-balanced by countervailing anticipated benefits.

Can such a statute be declared unconstitutional by the courts? The conditions which the Legislature seeks to remedy are not imaginary. The Legislature might reasonably find that they are caused by oppressive exercise of liberty of contract, and that removal of such conditions is necessary for the general welfare. The remedy devised is reasonably calculated to end those conditions, though perhaps the remedy may carry in its train other evils. The remedy is on the whole not unfair to employers or to employees; though individuals may suffer hardship.

Other countries with traditions similar to our own have adopted remedies more drastic to meet analogous conditions. The restriction upon liberty of contract is directed against a harmful and perhaps unfair use of that liberty. The constitutional limitations upon legislative power must be enforced by the court, but they may not be extended beyond their fair meaning. Liberty of contract, like other forms of liberty, must be zealously guarded against invasion by the State, but fear that in the future the State may encroach by unreasonable legislation upon the liberties of the individual cannot justify a present limitation upon the powers of the State, not expressed or clearly implicit in the Constitution. Liberty may be reasonably restrained upon grounds of general welfare. Courts must decide each case upon the facts there presented; upon the facts presented in this case we do not find any ground for saying that the Legislature has acted arbitrarily or transcended the limitations upon its powers.

The order should be affirmed, with costs.

O'Brien, Hubbs and Finch, JJ., concur with Crane, Ch. J.; Lehman, J., dissents in opinion in which Crouch and Loughran, JJ., concur.

Ordered accordingly.

APPENDIX B.

MANDATORY ORDER NO. 1 GOVERNING WOMEN AND MINORS IN LAUNDRY OCCUPATIONS

WAGES—Women and Minors employed at laundry occupations shall be paid a Minimum Fair Wage at rates not less than the following:

	NEW YORK CITY AREA	OUTSIDE NEW YORK CITY
BASIC RATE FOR A FULL WORK WEEK OF 40 HOURS:	**31¢ PER HOUR** or **$12.40 PER WEEK**	**27½¢ PER HOUR** or **$11.00 PER WEEK**
PAYMENT FOR UNDERTIME FOR A WEEK OF LESS THAN 40 HOURS:		
A bonus of 10 per cent shall be added to the basic rate per hour, until the wage paid for the week's work is equal to the wage paid for a basic 40 hour week—(i.e., $12.40 and $11.00 respectively).	**34 1/10¢ PER HOUR** or 10 per cent added to 31¢ per hour for a week of **LESS THAN 37 HOURS.**	**30¼¢ PER HOUR** or 10 per cent added to 27½¢ per hour for a week of **LESS THAN 37 HOURS.**
	$12.40 A WEEK for a week of **37-40 HOURS** inclusive.	**$11.00 PER WEEK** for a week of **37-40 HOURS** inclusive.
PAYMENT FOR OVERTIME FOR A WEEK OF MORE THAN 40 HOURS:		
For the first five hours beyond the basic 40 hours, the basic rate shall be paid.	**31¢ PER HOUR.**	**27½¢ PER HOUR.**
Time and a half rates shall be paid for each hour after the 45th.	**46½¢ PER HOUR** or 50 per cent added to 31¢ per hour.	**41¼¢ PER HOUR** or 50 per cent added to 27½¢ per hour.

ADMINISTRATIVE REGULATIONS

1. **PIECE WORK.** Women and minors employed on a piece work basis shall be employed at piece work rates which yield to each such employee rates not less than the minimum fair wage standards established for time workers under Mandatory Order No. 1.

2. **MINORS AND LEARNERS.** The same minimum fair wage standards which apply to women over 21 shall apply to all women and minors except such as may be specially licensed under regulation 3. No learners and no apprenticeship period shall be recognized.

3. **HANDICAPPED.** No woman or minor whose earning capacity has been impaired may be paid at less than the minimum fair wage standard, until a special license, in accordance with the provisions of Section 558 of the Labor Law, has been obtained by the employer from the Division of Minimum Wage.

4. **WAITING TIME.** Time during regular working hours, and at other periods when employees are required to wait on the premises and no work is provided by the employer, shall be counted as working time and paid at the individual employee's regular wage rate.

5. **STATEMENT TO EMPLOYEE.** With every wage payment to each employee subject to Mandatory Order No. 1, there shall be given a statement in a form prescribed by the Commissioner, explaining the rates and earnings received under the minimum fair wage standards established by this order.

6. **PAYMENT OF WAGES.** For hotels, institutions and other establishments which are not covered by Section

195 of the Labor Law (requiring cash payment for the industries therein enumerated except when special permit is obtained) the following regulations shall govern:

A. **TIME OF PAYMENT.** Wages shall be paid weekly and shall be received by the employee within six days after each week's wages have been earned.

B. **MEALS AND LODGING.** No deductions shall be made from the minimum fair wage rate for meals or lodging, or both, furnished to any employee by the employer, until the employer's application for such deduction has been reviewed and approved by the Division of Minimum Wage, and a special permit issued and posted accordingly.

C. **UNIFORMS.** Where uniforms are used, the employer shall in no case make deductions of more than a fair charge for, and in no case more than the actual cost of the uniforms. No deductions may be made for uniforms, until the employer's application for such deductions has been reviewed and approved by the Division of Minimum Wage, and a special permit issued and posted accordingly.

D. **SERVICE ALLOWANCES AND OTHER DEDUCTIONS.** No deductions shall be made from the minimum fair wage rate on account of insurance or for any other service or for any other cause until the employer's application for such deduction has been reviewed and approved by the Division of Minimum Wage, and a special permit issued and posted accordingly.

7. **RECORDS.** Each employer shall keep a record, in a form prescribed by the Industrial Commissioner, of the hours and wages of each employee, and shall, on demand, submit a sworn copy of such record to the Commissioner or his representative, together with such information as the Commissioner may in his discretion deem necessary.

8. **CERTIFICATE OF AGE.** For purposes of this order each employer shall keep on file a certificate of proof of age for each male minor under 21 years of age employed at laundry occupations.

9. **POSTING.** A notice issued by the Department of Labor, setting forth the provisions of Mandatory Order No. 1 and administrative regulations, shall be posted in a conspicuous place in every room where women and minors are employed at laundry occupations.

10. **INSIGNIA OF COMPLIANCE.** The Commissioner may hereafter, at his discretion, issue an insignia of compliance which the employer, upon proof of compliance with the mandatory order and administrative regulations, may thereafter display and be entitled to use.

This order shall come into force and be effective on and after August 6, 1934.

Dated New York, August 1, 1934.

ELMER F. ANDREWS,
Industrial Commissioner.

PENALTIES

FAILURE TO PAY RATES ESTABLISHED UNDER MANDATORY ORDER No. 1 is a misdemeanor, punishable by a fine of not less than fifty nor more than two hundred dollars or by imprisonment of not less than ten nor more than ninety days or by both such fine and imprisonment, and each week in any day of which an employee is paid less than the established minimum rates and each employee so paid less shall constitute a separate offense.

Any woman or minor paid less than the established minimum rates may recover in a civil action the full amount due him together with costs and such reasonable attorneys' fees as may be allowed by the court, and any agreement between him and his employer to work for less than the established minimum rates shall be no defense to such action. At the request of any woman or minor paid less than the minimum wage to which he was entitled the Industrial Commissioner may take an assignment of such wage claim in trust for the assigning employee and may bring any legal action necessary to collect such claim.

DISCRIMINATION AGAINST OR DISCHARGE OF ANY EMPLOYEE because of participation in any investigation or hearing relating to the Minimum Fair Wage Act is a misdemeanor, punishable by fine of not less than $50 nor more than $200.

FAILURE TO KEEP OR FURNISH THE RECORDS REQUIRED is a misdemeanor, punishable by fine of not less than $25 nor more than $100, each day of such failure to keep or furnish the records required constituting a separate offense.

DEFINITIONS

1. **MINORS.** All workers under 21 years of age.

2. **LAUNDRY OCCUPATIONS.** All processes directly concerned with the cleansing, collection and distribution of laundry wares. It shall not include occupations concerned with plant maintenance or office workers.

3. **NEW YORK CITY AREA.** The City of New York and all territory in Westchester County and Long Island within a distance of 15 miles from the New York City line.

4. **CERTIFICATE OF AGE.** A minor over 17 years of age may apply for a certificate of age to the superintendent of schools or to an employment certificating officer. The certificate, signed by the officer issuing it, must contain the name, date of birth, address and signature of the applicant and shall be issued on such evidence that he is over 17 years of age as is required for the issuance of an employment certificate.

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No. 838

Supreme Court,
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1935.

FREDERICK L. MOREHEAD, as the Warden of the City Prison of the Borough of Brooklyn,

Petitioner,

against

PEOPLE ex rel. JOSEPH TIPALDO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

	PAGE
Statement	1
Argument	2
Brief in Opposition:	
1. Same issues as Adkins case	2
2. New York statute purely wage fixing	4
3. New York statute has double standard; i. e., cost of living and value of services	4
4. Factual background same as in Adkins case	5
5. Constitutional rights unaffected by economic inequalities	5
6. Court of Appeals holds law violates State Constitution	6

CITATIONS.

Adkins v. Children's Hospital, 261 U. S. 525	2
Coppage v. Kansas, 236 U. S. 1	5
Charles Wolf Packing Co. v. Court of Industrial Relations of Kansas, 262 U. S. 522	3
Donham v. West-Nelson Mfg. Co., 273 U. S. 657	3
Muller v. Oregon, 208 U. S. 412	5
Murphy, as Attorney General, v. Sardell, 269 U. S. 530	3
Near v. Minnesota, 283 U. S. 697, 707, 708	3
Ribnick v. McBride, 277 U. S. 350	3
Tyson v. Banton, 273 U. S. 418	3

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Respondent.

BRIEF OF NEW YORK STATE HOTEL ASSOCIATION, AS AMICUS CURIAE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The New York State Hotel Association, which appeared herein as amicus curiae in the Court of Appeals, submits by consent this brief in opposition to the petition of the Attorney General of New York for a writ of ceritorari to review a decision by the New York Court of Appeals sustaining the contention of the respondent that the Minimum Wage Law of the State of New York violates his rights under the Fourteenth Amendment of the Federal Constitution and Article 1, Section 6 of the State Constitution (see Majority Opinion, p. 53, Petition).

Respondent consents to issuance of the writ, but the law is applicable to all industries in the State, including the hotel and restaurant industries, in which it is estimated more than 60,000 adult women are employed. Their rights and those of their employers should not be foreclosed by any concession of the respondent.

Argument.

1. The issues presented here are the same as those decided in *Adkins* v. *Children's Hospital*, 261 U. S. 525.

2. The New York Minimum Wage Statute, like the Act of Congress, which was considered in the Adkins case, is purely a wage fixing law.

3. The Act of Congress had one standard, the living wage; this State has added another, reasonable value. The New York Minimum Wage must include both.

4. The factual background recited in the preamble of the New York Statute is practically the same as that presented in the Adkins case.

5. The rights guaranteed under the Fourteenth Amendment of the Federal Constitution and Article I, Section 6 of the State Constitution are not affected by the ebb and flow of economic tides.

6. The law violates the State Constitution.

POINT I.

The issues presented here are the same as those decided in Adkins v. Children's Hospital, 261 U. S. 525.

In the Adkins case the Court found that all the labor cases in which interference with due process had been upheld fell within one or another of the following four categories:

1. Statutes fixing rates and charges by business impressed with public interest.

2. Statutes limited to contracts for performance of public work.

3. Statutes prescribing the character, methods and time of payment of wages.

4. Statutes fixing hours of labor.

The Court determined that the District of Columbia Statute was not within any of the foregoing classes, and was purely a wage fixing statute.

The Court followed the Adkins case in:

Charles Wolf Packing Co. v. *Court of Industrial Relations of State of Kansas,* 262 U. S. 522;
Murphy, as Attorney General, v. *Sardell,* 269 U. S. 530;
Donham v. *West-Nelson Manufacturing Co.,* 273 U. S. 657;
Ribnick v. *McBride,* 277 U. S. 350;
Tyson v. *Banton,* 273 U. S. 418.

In *Near* v. *Minnesota* (283 U. S. 697, 707, 708), the Chief Justice discussing liberty of contract, cited Adkins, Tyson and Ribnik cases, saying:

"So, while liberty of contract is not an absolute right, and the wide field of activity in the making of contracts is subject to legislative supervision (*Frisbie* v. *United States,* 157 U. S. 161, 165), this Court has held that the power of the State stops short of interference with what are deemed to be certain indispensable requirements of the liberty assured *notably with respect to the fixing of prices and wages.*" (Italics ours.)

POINT II.

The New York Minimum Wage Statute, like the Act of Congress which was considered in the Adkins case, is purely a wage fixing law.

The New York Minimum Wage Law appears at page 27 of the petition for the writ.

It does not regulate hours or conditions of labor. It is not emergency legislation.

It is designed only for one purpose, *the fixing of the amount of wages by law instead of by contract.*

POINT III.

The Act of Congress had one standard, the living wage; this State has added another, reasonable value. The New York Minimum Wage must include both.

In the majority opinion the New York Court of Appeals said:

> "The New York Act, as above stated, prohibits an oppressive and unreasonable wage, which means *both* less than the fair and reasonable value of the services rendered *and* less than sufficient to meet the minimum cost of living necessary for health. The Act of Congress had one standard, the living wage; this Act has added another, reasonable value. The Minimum Wage must include both" (p. 56, Petition for Writ).

Supporting this finding see subdivisions 7 and 8 of Section 551 (p. 30 of Petition), and Section 552 (p. 31 of Petition).

POINT IV.

The factual background recited in the preamble of the New York Statute is practically the same as that presented in the Adkins case.

The preamble of the New York Statute (Section 550, p. 28, Petition) recites essentially the same factual background urged upon the Court in the Adkins case. It is all found in more than 1,100 pages of material submitted by Mr. Frankfurter in that case.

Summed up it is inequality of bargaining power, and unfair competition due to differentials in wages. These conditions are as old as business itself and are inevitable under our American system.

Practically the same factual background was submitted to the Court in *Coppage* v. *Kansas*, 236 U. S. 1, and *Muller* v. *Oregon*, 208 U. S. 412.

POINT V.

The rights guaranteed under the Fourteenth Amendment of the Federal Constitution and Article I, Section 6 of the State Constitution are not affected by the ebb and flow of economic tides.

The Attorney General argues that economic stress calls for re-appraisal of laws fixing minimum wages for women, and that "new and changing conditions create new public needs and justify new restrictions on the rights of individuals for the common good".

Inequalities of fortune have always existed under our constitutional system, in good times and bad, but we submit that new restrictions on the rights of individuals in the enjoyment of liberty and property guaranteed by the Constitution will not promote the common good or general welfare.

The question at issue is whether the State has power under the Constitution to enact a wage fixing law in its attempt to adjust inequalities of fortune and eliminate unfair competition; and not whether such legislation is reasonable, desirable or socially popular.

POINT VI.

The Court of Appeals holds that the law contravenes Article 1, Section 6 of the State Constitution.

The due process clause of the State Constitution and of the Fifth and Fourteenth Amendments of the Federal Constitution are identical in the provision that no one shall "be deprived of life, liberty or property without due process of law".

In its opinion the Court of Appeals points out the respondent's contention that the Minimum Wage Law violates both his Federal and State Constitutional rights (p. 53, Petition).

The Court of Appeals has adopted the same interpretation of the State Constitution that the Supreme Court applied to the Fifth Amendment in the Adkins case.

CONCLUSION.

The determination of the State Court of Last Resort that the State Minimum Wage Law deprives the respondent of his rights under the Federal and State Constitutions calls for no review by the United States Supreme Court.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
CLERK

IN THE

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BRIEF OF NEW YORK STATE HOTEL ASSOCIATION AS AMICUS CURIAE.

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CONTENTS.

	PAGE
Statement	1
Argument, summary	3
I. Nature and scope of law	4
II. Act of Congress had one standard, living wage; New York has added another, reasonable value; minimum wage must include both	7
III. Factual background of District Law and New York law essentially the same	10
IV. A minimum wage for women alone is discriminatory and not corrective of conditions recited as justifying its enactment	14
V. The law deprives employers and employees of their rights under Fourteenth Amendment and State Constitution	17

APPENDIX.

A. Proposed minimum wage order for hotel and restaurant industries	31

CASES CITED.

	PAGES
Adkins v. Children's Hospital, 261 U. S. 525	7, 16
Adair v. United States, 208 U. S. 161, 174	16
Bunting v. Oregon, 243 U. S. 426	15
Bailey v. Drexel Furniture Co., 259 U. S. 20	19
Borden Co. v. Baldwin, 293 U. S. 194	25
Coppage v. Kansas, 236 U. S. 1, 14, 15, 17, 19	1, 17, 18, 20
Chas. Wolfe Packing Co. v. Court Ind. Relations, 262 U. S. 522	23
Donham v. West-Nelson Mfg. Co., 237 U. S. 657	23
Frisby v. United States, 157 U. S. 160, 166	21
Fort Smith & Western R. R. v. Mills, 253 U. S. 206	22
Jones v. Sec. & Exch. Com., decided April 6, 1936	30
Muller v. Oregon, 208 U. S. 412	10, 15
Mugler v. Kansas, 123 U. S. 623	19
Murphy as Atty. Gen. v. Sardell, 269 U. S. 530	23
Nebbia v. People, 291 U. S. 502	25
Near v. Minnesota, 283 U. S. 697, 707, 708	25
Prudential Ins. Co. v. Cheek, 257 U. S. 516	22
Ribnick v. McBride, 277 U. S. 350	23
Stetler v. O'Hara, 243 U. S. 629	11
Truax v. Raisch, 239 U. S. 33	22, 29
Tyson v. Banton, 273 U. S. 418	23
Wilson v. New, 243 U. S. 332	22
Williams v. Standard Oil Co., 278 U. S. 235	24

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BRIEF OF NEW YORK STATE HOTEL ASSOCIATION, AS AMICUS CURIAE.

Statement.

By consent we file this brief on behalf of the New York State Hotel Association, which is representative of the industry, and has within its membership more than 1,000 hotel operators, who employ a large number of women.

The New York Minimum Wage Law (Chapter 584, Laws, 1933, Article 19, State Labor Law) permits the fixing in the manner therein described of minimum wages for women and minors employed in trade and industry throughout the

State. We make no point with regard to its constitutionality as applied to minors.

The first industry to which the law was applied was the laundry industry for which a mandatory order fixing minimum wages for women employed in that industry was in force and effect; and for violation of which order the relator was indicted.

In 1935 a Minimum Wage Board was appointed by the Industrial Commissioner to investigate wages and conditions of labor of women and minors in the hotel and restaurant industries, in which upwards of 60,000 women are employed.

This Board filed its report and proposed minimum wage order, which were approved by the Industrial Commissioner on December 6, 1935. A copy of such proposed order is hereto appended, marked Exhibit A.

If the statute is sustained as valid, the Industrial Commissioner will in due course issue an order requiring the payment of minimum wages, in accordance with the findings and recommendations of the Wage Board, to all adult women employed in hotels and restaurants throughout the State.

The law has not yet been applied to any other industries in the State, but the Commissioner has the power, and on the petition of fifty or more residents of the State is under a duty, to apply the law to women employed in any and all other industries in the State in the manner outlined in the statute.

The large investment in hotels and restaurants in the State and the large number of adult women employed in these establishments makes the law a matter of vital interest both to employers and employees in these industries.

The Issue.

The sole issue is the constitutionality of the law.

The Argument.

I.

The nature and scope of the New York Minimum Wage Law.

II.

The Act of Congress had one standard, the living wage; this State has added another; reasonable value; the minimum wage must include both.

III.

The factual background of the District of Columbia minimum wage law and the New York minimum wage law is essentially the same.

IV.

A minimum wage for women alone is not corrective of the conditions recited as justifying its enactment, either as a protection to women, industry, or public welfare. The statute discriminates against women in their competition with men for employment.

V.

The law deprives employers and employees of their rights under the Fourteenth Amendment of the Federal Constitution and under Article 1, Sec. 6 of the State Constitution.

POINT I.

The nature and scope of the New York Minimum Wage Law.

There are certain important features of the law which are not subject to controversy.

1. It applies only to adult women and minors; not to men.

2. It is not an emergency law.

3. It is a wage-fixing law, pure and simple. It does not regulate hours or conditions of labor. It is not concerned with safety and protection of employees in dangerous employment. It is concerned only with the amount of wages to be paid to adult women and minors, and delegates to a Wage Board and to the Industrial Commissioner of the State authority to fix and prescribe the wage rate or rates.

4. It is applicable to any and all industries, trades or businesses, except only "domestic service in the home of the employer or labor on a farm", in which women or minors are gainfully employed (§551, Par. 6).

5. Paragraph 7 of Section 551 provides:

> "'An oppressive and unreasonable wage' shall mean a wage which is both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health."

Paragraph 8 of the same section provides:

> "'A fair wage' shall mean a wage fairly and reasonably commensurate with the value of the service or class of service rendered."

Section 552 provides:

"It is hereby declared to be against public policy for any employer to employ any women or minor in an occupation in this state at an oppressive and unreasonable wage as defined in section five hundred and fifty-one of the article and any contract, agreement or understanding for or in relation to such employment shall be null and void."

6. The Wage Board appointed by the Industrial Commissioner to report and recommend minimum wages in any industry, is composed of nine members, three representing employers and three representing employees in the industry and the other three disinterested persons representing the public.

The Board has full power to subpoena witnesses and records and at the conclusion of its investigation and within sixty days of its organization "shall submit a report including its recommendations as to minimum fair wage standards for women and minors in the occupation or occupations, the wage standards of which the Board was appointed to investigate."

The Board may differentiate and classify employments according to the nature of the service rendered and recommend "appropriate minimum fair rates for different employments". It may recommend fair wage rates varying with localities, if such differentiation does not affect an unreasonable discrimination against any locality. It may recommend suitable rates for learners and apprentices, which rates may be less than those recommended for experienced workers (Section 555).

The Industrial Commissioner may reject or accept such report. If he accepts it he holds a public hearing or hearings at which those for and against the recommendations may be heard. After such hearings the Commissioner shall

approve or disapprove the report. If he disapproves it he may re-submit the matter to the same Board or appoint a new Board. If the Commissioner approves the report of the Board he "shall make a directory order which shall define minimum fair wage rates in the occupation or occupations as recommended in the report of the Wage Board" and in connection therewith make administrative regulations governing learners, piece rates, over-time rates, deductions for board, lodging or other service furnished by the employer, and may modify such rates in special cases, but may not depart from the basic minimum rates recommended by the Wage Board" (Section 557).

For violation of the directory order, after a hearing before the Commissioner, an employer may be publicized as a violator (Section 559).

After nine months the Commissioner, after a public hearing, may make the order mandatory; and violation of the mandatory order is a crime punishable by fine or imprisonment or both (Section 565).

Section 563 provides that

> "All questions of fact arising under this act except as otherwise herein provided shall be decided by the Commissioner or the Director and there shall be no appeal from the decision of the Commissioner or the Director on any such question of fact, but there shall be a right of review by the Industrial Board and the Courts as provided in Article 3 of the Labor Law from any ruling or holding on a question of law included or embodied in any decision or order of the Commissioner or Director."

The pertinent provision of the Labor Law provides for review by the State Supreme Court after an adverse decision by the Industrial Board. The Industrial Board is a part of the Labor Department over which the Industrial Commissioner has jurisdiction. The foregoing we believe to be a fair outline of the pertinent provisions of the statute under review.

POINT II.

The Act of Congress had one standard, the living wage; this State has added another, reasonable value. The Minimum Wage must include both.

Mr. Chief Justice Crane, speaking for the majority of the New York Court of Appeals, concluded his comparison of the Act of Congress, which was litigated in *Adkins* v. *Children's Hospital*, 261 U. S. 525, with the New York Minimum Wage Law as follows:

> "The New York Act, as above stated, prohibits an oppressive and unreasonable wage, which means *both* less than the fair and reasonable value of the services rendered *and* less than sufficient to meet the minimum cost of living necessary for health. The Act of Congress had one standard, the living wage; this State Act has added another, reasonable value. The minimum wage must include both."

Supporting this finding of the Court of Appeals are Paragraphs 7 and 8 of Section 551, and Section 552, quoted supra (pp. 4, 5).

The peculiar phraseology of the New York Statute with respect to the standards of the minimum wage is partly explained by Mr. Justice Sutherland's criticism, in the Adkins case, of the cost of living standard in the Minimum Wage Act of Congress. Sound and logical as that criticism was, we think the authors of the New York Law over-emphasized it, and overlooked the basic point of the decision that any legislative act which fixes the amount of wages to be paid in connection with contracts other than for the performance of public work or in businesses impressed with the public interest, and deprives the employer and employee of the right of private bargaining in connection therewith, contravenes the constitutional

rights of both, without regard to whether the standard of the wage fixed by Government is the cost of living or the reasonable value of services, or both.

Those authors, however, were fully aware that the cost of living standard offered a more plausible excuse for the exercise of the police power than the reasonable value standard. Therefore Section 552 was written into the statute, outlawing employment of "any woman or minor in an occupation in this State at an oppressive and unreasonable wage, as defined in Section 551" of the Act; that is, one which is "both less than the fair and reasonable value of the service rendered and less than sufficient to meet the minimum cost of living necessary for health."

No Wage Board or Government official to whom the law delegates the power to fix a minimum wage can disregard this mandate of the statute. Reasonable value of the service of any employee is a fact dependent upon many conditions, and is even more difficult to determine than the amount sufficient to meet the necessary cost of living necessary for health, which, as Mr. Justice Sutherland observed, "will depend upon a variety of circumstances", so many and so variable and "so vague as to be impossible of practical application with any reasonable degree of accuracy."

The law provides that there is no appeal on questions of fact as determined by the Wage Board or the Commissioner. Those affected by the determination of these officials as to what is reasonable value or necessary cost of living have no redress from unreasonable and arbitrary determination of fact.

It is apparent that a reasonable value standard is as impossible of "practical application with any reasonable degree of accuracy" as is the cost of living standard. Many elements enter into the determination of reasonable value; this varies according to the character of the work, the skill required, and the experience, ability and industry of the worker; it varies in different establishments because dif-

ferent standards of ability and efficiency are required according to the class of patronage therein.

Moreover the element of value to the employer must be considered, for the reasonable value base works both ways, whereas the cost of living standard looks only to the varying necessities of the employee.

The legislature has here imposed upon administrative officers a double standard, doubly difficult of application.

How the Wage Board appointed to investigate the hotel and restaurant industries attempted to apply this double standard is revealed by its proposed wage order for those industries, hereto appended as Exhibit A.

By reference thereto it will be noted that the minimum wages are fixed for different parts of the State without regard to the varying value of services as determined by the factors above mentioned.

That the Board abandoned reasonable value and adopted a living wage standard is shown by the foregoing, and by the fact that the only differential in its minimum wage schedule for service and non-service employees,* respectively, is based on geographical location and the Board's estimate of the varying costs of living in metropolitan cities, smaller cities, and other communities.

By reference to Subdvision 8 of Section 551, and to Section 552, we find the Wage Board followed the law, which provides that in "establishing a minimum fair wage" the board "*may* (italics ours) take into account all relevant circumstances affecting the value of the service or class of service rendered". But the board is not required to take these factors into account. Indeed it could not do so, because the value of human labor depends on the factual situation in each individual case.

If the statute is upheld, no woman whose experience, ability and industry is worth to an employer less than the

*Note: "Service" employees are waitresses and bell boys who receive tips." "Non-service" includes all other employees.

minimum, will ever get a job; and no job in which the kind of work to be done is worth less than the minimum will go to a woman.

The more serious ground of objection to the law, however, is not the wage standard, but the substitution of Government fiat for freedom of individual bargaining as to amount of wages in industry not impressed with public interest.

POINT III.

The factual background of the District of Columbia Minimum Wage Law and the New York Minimum Wage Law is essentially the same.

The factual background recited in Section 550 of the New York Act as requiring the exercise of the police power presents a picture of economic conditions in industry and trade which is as old as industry itself. Certainly no one familiar with labor conditions during the last twenty-five years would presume to say that the conditions outlined in Section 550 of this Act are any different from what they were when the District of Columbia Law was enacted and when the Adkins case was decided. Any doubt about it is dissolved by reference to the briefs of Mr. Louis Brandeis (now Mr. Justice Brandeis) in the case of *Muller* v. *Oregon* in 1907

and again in the case of *Stettler* v. *O'Hara* in 1914 with their hundreds of pages of statistical background submitted to the Court in the effort to justify minimum wage legislation.

On page 136 of the brief of Mr. Brandeis in the Stettler case, in 1914, we find this comment:

> "Investigation has proved that the wages of women are fixed at present only by supply and demand. Earnings for the same work in a given industry vary from establishment to establishment. The wages fixed are neither by the value of the service rendered nor by what industry can afford."

On the same page he presents a report of the Social Survey Committee of the Consumers League in which it is said:

> "Owing to the lack of organization among women workers and the secrecy with which their wage schedules are guarded, there are absolutely no standards of wages among them. Their wages are determined for the most part by the will of the employer without reference to efficiency or length of service on the part of the worker. This condition is radically unjust."

And on page 137 of this brief Mr. Brandeis quotes from an article by Edith Abbott, Ph. D., Assistant Director of the Chicago School of Physics and Philanthropy, written in 1910, in which she says:

> "Today there is a group wage * * * but these are determined not by the bargaining power of the man, but often by the helplessness of the women and of the minor children who have become the apparent collectors of their own wages.

> From this helplessness which characterizes women workers in bargaining spring many difficult problems. There is the question of their inability to secure right conditions under which to do their work, to limit the amount and duration of their work so as to maintain their own health and that of their children. From this weakness arises the necessity on the part of the community of assuming control over the wage contract so as to protect women wage earners from undue exploitation * * *.".

Quoting from Volume 18, Employment of Women and Children in Selected Industries, Senate Document #645, Sixty-first Congress, Second Session, 1911:

> "Apparently the wages of women in factory industries are very largely unstandardized. In general they are low but the degree of their lowness seems not to vary very much with the character of the work done as with the custom of a given industry, or, more accurately, of a given employer for earnings within a given industry vary widely from one establishment to another.
>
> And when it comes to the question of earnings * * *, the determining factor seems not so much what their services were worth or what the industry could afford as the individual employer's attitude upon the matter, * * *. With some employers the lowest wages a woman or girl could be induced to work for decided what she could get."

In the *Adkins* case Mr. Frankfurter urged in support of the Minimum Wage Law essentially the same factual background set forth in the New York Law.

The language of the Supreme Court in Coppage v. Kansas, 263 U. S. 1, quoted on page 20 of this brief, reveals judicial knowledge then of the same economic conditions recited in the New York Law.

The factual background recited in the New York Law is wholly economic. The remedy, such as it is, provided in the law is likewise wholly economic. The Legislature asserts that it is acting "for the protection of industry; also for the protection of women employed therein and the public interest in their health and well-being and in prevention of deterioration of the race."

After reciting these facts, which present a case for proper regulation rather than attempted wage fixing, the Legislature states its purpose to do in this act what it wholly fails to do.

The regulation or limitation of hours bears an obvious relation to the health and well-being of women, and has been sustained; but a restriction as to the amount of wages which a woman may be permitted by law to accept for her services bears no relation whatever to her health, or to the deterioration of the race, or to the public interest in either.

Neither does a minimum wage for women, which is not likewise applicable to men, protect industry.

This law attempts to correct inequalities of fortune inevitable under a capitalistic system and our constitutional form of Government, which recognizes private ownership of property and personal liberty; the announced purpose to protect industry is an admitted attempt to protect employers in industry against unfair competition upon which a minimum wage for women alone has little bearing or effect, and in which the public interest and welfare is only remotely concerned.

The statute does not practice what it preaches. An attempt to level economic inequalities by interference with the normal exercise of property rights does not promote the health of women, nor of trade; and how it can affect the deterioration of the race is beyond our powers of imagination.

POINT IV.

A minimum wage for women alone is not corrective of the conditions recited in the New York Law as justifying its enactment, either as a protection to women, industry or the public interest and welfare. The statute works discrimination against and fraud upon women in their competition with men for employment in industry and trade.

All of the legislative recitals in Section 550 are set forth as applying to women employed in industry. There is not one condition or fact therein recited which does not apply with equal or greater force to men. Their wages, too, often bear no relation to value of service; they, too, are exploited by some employers; and the employer who pays his men oppressive and unfair wages competes just as unfairly and effectively as the chiselling employer of women. More men than women are employed in industry; more men than women support dependents; and the health and well-being of adult women and of children is just as injuriously affected when a man cannot earn a living wage or a reasonable wage for his family as when a woman cannot do so. The effect as to "deterioration of race" is the same in either case.

In this situation the legislature enacts a minimum wage law for women only, leaving men free to bargain without interference by or assistance from the State, according to the social viewpoint.

A minimum wage for women alone cannot cure bad employment conditions common to both sexes; moreover, it works an unfair discrimination against woman in her competition with men for employment.

Proponents of this form of social legislation have argued before Legislative Committees and before the Courts that while woman stands before the law on an equality with man, she requires special protection by the State because she is physically his inferior and because of her childbearing functions.

This is a sound argument in support of proper protective regulation such as limitation of hours and provision for proper conditions of employment, which have some relation to health, but it is fallacious in support of a minimum wage law whose only purpose and effect is to readjust economic relations between employer and employed.

If a law fixing the amount of wages is not a health measure affecting general welfare (and freedom to fix the amount of wages surely is not dangerous to health, morals or safety), then it is not a health law for women any more than it would be for men.

Hours of service laws have been sustained as to women (Muller v. Oregon, 208 U. S. 412) and likewise as to men (Bunting v. Oregon, 243 U. S. 426).

Statutes limiting hours of service in certain occupations and prescribing rest days, applicable to both sexes, are much in evidence in the Labor Law of the State.

On the other hand, if a law fixing the amount of wages *is* a health measure required for the protection of general welfare, why has it been applied to women alone and not to men, since both stand equal before the law and the health of men as well as women has been held to be a matter of public concern? The answer to this is that the American Federation of Labor has consistently opposed Minimum Wage Laws for men. Its announced policy is minimum wages for women and minors and collective bargaining for men. The Federation cannot be accused of laches in promoting the interests of its members, or of lack of political acumen and power in getting the labor laws it wants. This was illustrated in the enactment of the New York Minimum Wage Law. At the time it was enacted by the Legislature, another bill introduced by Senator Desmond, which provided a minimum wage both for men and women, as an emergency measure, was also passed by both houses, and both bills were placed on the Governor's desk for approval, pending which a hearing on both was held before

the Governor. At this hearing the Federation opposed the emergency bill for men *and* women, and urged approval of the bill which applied to women and minors only. The sexless wages bill was vetoed, and this bill was approved by the Governor, with the explanation that he had been advised that the constitutionality of a bill fixing a minimum wage for men was doubtful.

On this point the comment of Mr. Justice Sutherland in the Adkins case is pertinent:

> "We cannot accept the doctrine that women of mature age, sui juris, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationship."

Also the comment of Mr. Justice Harlan in *Adair* v. *United States,* 208 U. S. 161, 174:

> "The right of a person to sell his labor upon such terms as he deems proper, is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it * * * in all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no Government can legally justify in a free land."

This statement of fundamental rights under the Constitution applies to men and women alike.

POINT V.

The law deprives employers and employees of their rights under the Fourteenth Amendment to the Federal Constitution and Article 1, Section 6 of the State Constitution.

As we have pointed out, this is purely a wage fixing statute. It does not aim to regulate hours or conditions of labor, protect safety of employees in dangerous employments, or to prevent fraud. Its sole purpose and effect is to substitute Government control of the amount of wages and deprive employers and employees of the right of bargaining as to the amount of wage to be paid.

This arbitrary deprivation of constitutional rights is sought to be justified by labelling it "an exercise of police power to promote general welfare" and then arguing that the means adopted to accomplish the purpose sought is reasonable and not arbitrary, and that the burden of proving the contrary is upon him who attacks the validity of the law.

But we submit that the question at issue in this case is not whether within the domain of the police power the legislature has acted with discretion and with reason, *but whether the law is within the domain of the police power at all.* The declaration of the legislature that "in the considered judgment of the legislature this article is constitutional" does not preclude this Court from pronouncing it otherwise any more than the equally solemn declaration of the New York Court of Appeals that the law is not constitutional, precludes this Court from finding that it is.

In *Coppage* v. *Kansas*, 236 U. S. 1, it was urged that employees as a class were at a disadvantage in making contracts because they were not financially able to be as independent as their employers and that it was necessary for the State to step in and aid one party to the contract. It is urged likewise in this case that women are not on

equal terms either with their employers or with men in bargaining for employment; and that selfish employers take advantage of this situation and "compel" women to work for less than what their services are worth and less than the amount necessary for healthful living. Because of this fact the proponents of this law contend that the State should step in and level these inequalities of bargaining power in the interest of social justice.

With reference to this same contention in the Coppage case (236 U. S. 1, 15), the Court said:

> "It seems to us clear that a statutory provision *which is not a legitimate police regulation* cannot be made such * * * by being enacted under a title that declares a purpose which would be a proper object for the exercise of that power." (Italics ours.)

Again (p. 17):

> "It is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights."

And on page 19:

> "The mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare' and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the amendment."

When the question is whether the legislative body has exceeded its authority (not whether it has abused its discretion), the Courts are at liberty and under a duty to determine whether the authority has been transcended.

In *Mugler* v. *Kansas* (123 U. S. 623) Mr. Justice Harlan said:

> "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the situation."

In the case of *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20, the Chief Justice said:

> "The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant, or the harm it will make from breaking down recognized standards."

The Fourteenth Amendment was intended to safeguard the liberty and property of individuals against the action of governmental majorities temporarily in power, regardless of whether such action is inspired by social reformers with benevolent motives or by special interests with selfish motives. The proponents of this law, who urge that freedom of contract is a fallacy, have overlooked the far-reaching consequences of a decision by this Court placing the stamp of its approval upon a law depriving individual citizens of rights long believed secure under the Constitution and conferring upon Government officials the right to fix the amount of wages to be paid in common occupation.

Prior to the decision of this Court in the Adkins case, we cannot find that the constitutionality of a wage fixing law had been directly passed upon by the Court, although

the question had been involved in many prior cases which were in that case painstakingly analyzed and reviewed by the Court; and its decision in that case has since been accepted by bench and bar as conclusive upon the question now again presented.

Because the prior labor cases were so thoroughly reviewed in the Adkins decision, we make only brief reference to prior pertinent cases.

In *Coppage* v. *Kansas* (236 U. S. 1, 14) this Court said:

> "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property.
>
> Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long established constitutional sense."

And again in the same case, at page 17:

> "As to the interest of the employed, it is said by the Kansas Supreme Court to be a matter of common knowledge that 'employees, as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making contracts of purchase thereof.' No doubt, whenever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employee. Indeed a little reflection will show that whenever the right of private property and the right of free contract coexist, each party when con-

tracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the Fourteenth Amendment, in declaring that a state shall not 'deprive any person of life, liberty or property without due process of law', gives to each of these an equal sanction; it recognizes 'liberty' and 'property' as coexistent human rights, and debars the states from any unwarranted interference with either.

"And since a state may not strike them down directly it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view. The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty."

In *Frisby* v. *United States* (157 U. S. 160, 166) this Court said:

"Generally speaking, every citizen has a right freely to contract for the *price* of his labor, services or property." (Italics ours.)

In *Truax* v. *Raisch* (239 U. S. 33, 41) this Court said:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure."

Again in *Prudential Insurance Co.* v. *Cheek* (257 U. S. 516) the Court said:

> "That freedom in the making of contracts of personal employment * * * is an elementary part of the rights of personal liberty and private property."

In *Wilson* v. *New* (243 U. S. 332) this Court said:

> "The right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed on standard is not subject to be controlled or prevented by public authority."

In *Wilson* v. *New* and in *Fort Smith and Western Railroad Co.* v. *Mills* (253 U. S. 206) it was held that the utmost to which the legislative power extends is to provide for the *temporary* continuance of wages in a business affected with a public interest, where necessary to prevent the stoppage of the public business until the parties could agree; and that beyond this, the freedom of contract with respect to wages is not subject to be controlled or be prevented by public authority.

Upon his review of these and other cases, Mr. Justice Sutherland distinguished the District of Columbia Minimum Wage Law from other statutes limiting freedom of contract between employers and employees, which the Court had sustained as valid. He found that all of the

cases in which the interference with due process had been upheld fell within one or another of the following four categories:

1. Statutes fixing rates and charges by business impressed with public interest.

2. Statutes limited to contracts for the performance of public work.

3. Statutes prescribing the character, methods and time of payment of wages.

4. Statutes fixing hours of labor.

We submit that the New York Minimum Wage Law is not within any of the foregoing classes; it falls completely outside the bounds of the police power.

The *Adkins* case has since been followed by this Court in the following cases:

Charles Wolf Packing Co. v. *Court of Industrial Relations of State of Kansas* (1923), 262 U. S. 522;
Murphy, as Attorney General, v. *Sardell,* 269 U. S. 530 (1925);
Donham v. *West-Nelson Mfg. Co.,* 273 U. S. 657 (1927);
Ribnik v. *McBride,* 277 U. S. 350 (1928);
Tyson v. *Banton,* 273 U. S. 418.

The *Wolf Packing Company* case involved the validity of the Court of Industrial Relations Act of Kansas which, among other things, provided that the Court of Industrial Relations could hear wage disputes and if it found public peace and health imperilled could make findings and fix wages. The Supreme Court held that so far as the statute

permitted wage fixing, it deprived the employer of its property and liberty of contract. The opinion was by Judge Taft, who dissented in the Adkins case.

The case of *Murphy* v. *Sardell* was an affirmance, per curiam, of a judgment of the Arizona District Court, holding, on the authority of the Adkins case, that the Arizona Minimum Wage Law was unconstitutional. Justice Holmes states that his concurrence is solely on the ground that he is bound by the decision in the Adkins case.

The case of *Donham* v. *West-Nelson Mfg. Co.*, involved the Minimum Wage Law of the State of Arkansas, which had been held void by the Eastern District of Arkansas. The judgment of the lower Court was affirmed, per curiam, on the authority of the Adkins and Murphy cases.

Tyson v. *Banton* was not a wage fixing case. It involved the constitutionality of a New York law prohibiting the resale of any theatre ticket at a price in advance of the price printed on the face of the ticket; the law was held void as an arbitrary and unreasonable interference with freedom of contract.

In the case of *Ribnik* v. *McBride* the Court held that a New Jersey act regulating employment agencies and conferring upon the Commissioner of Labor power to fix prices which the agent charged for his services, violated the Fourteenth Amendment.

Mr. Justice Sutherland, speaking for a majority of the Court in *Williams* v. *Standard Oil Co.* (278 U. S. 235, 239), said:

> "It is settled by recent decisions of this court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is 'affected with a public interest' " (citing the *Wolff*, *Tyson*, *Fairmont* and *Ribnik* cases).

Chief Justice Hughes, in *Near* v. *Minnesota* (283 U. S. 697, 707, 708), cited the *Adkins, Tyson* and *Ribnik* cases in support of the broad proposition which he thus stated:

> "So, while liberty of contract is not an absolute right, and the wide field of activity in the making of contracts is subject to legislative supervision (*Frisbie* v. *United States,* 157 U. S. 161, 165), this court has held that the power of the state stops short of interference with what are deemed to be certain indispensable requirements of the liberty assured, *notably with respect to the fixing of prices and wages.*" (Italics ours.)

We show in Point III that the factual background recited in the preamble of the New York law, presents nothing essentially different from the factual background presented to the Court by voluminous factual briefs submitted in the Adkins case.

We also show, in Point II, that the New York law has the double standard, living cost and value of service while the District law had only the single standard of living cost.

We find nothing in the legal argument presented by the Attorney General of New York, nor in the brief submitted by the Attorney General of Ohio, to justify a different conclusion as to the constitutionality of this wage law from that reached by the Court in the Adkins case.

The Attorney General has cited the cases of *Nebbia* v. *People,* 291 U. S. 502, and *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194.

In both these cases the constitutionality of the *Emergency* Milk Control Law of New York was at issue.

Section 258a, the first in Article 21a, recites the *public emergency* in the milk industry which the Legislature reasonably expects to continue until April 1, 1936.

In its decision, after reviewing the seriousness of the emergency and the methods prescribed to correct it, the Court observes that "save the conduct of railroads, no business has been so thoroughly regimented and regulated by the State of New York as the milk industry".

While the milk industry has never been *legally* defined as a public utility, like railroads and lighting companies whose rates and prices are fixed by public service commissions, the milk industry *factually* affects the public health and welfare more vitally than any of the industries which have been legally defined as public utilities. That this influenced the decision of the Court is a reasonable assumption in view of the Court's comment that the milk industry is not a public utility in a *legal* sense.

Prior to the advent of railroads and electric lights and telephones, our forefathers lived healthfully, unconscious of inconvenience, but from the day that the first child was born milk has been a vital necessity of life. Any condition which interrupts a continuing fresh supply of milk is admittedly a matter of such concern to the public that there is basis for the argument that the Emergency Milk Control Law is justified as a measure of protection of public health and even life itself.

These two cases are easily distinguished from the case at bar in applying the test of constitutionality.

The law under consideration in the *Nebbia* and *Borden* cases was admittedly an emergency law designed to provide temporary relief.

The Minimum Wage Law is not stated or designed to meet an emergency; its provisions enact a permanent, social, economic and political policy of the State. This law permitting Government to fix the amount of wages of women affects the general public health and welfare most remotely, if at all.

The whole history of labor litigation in the Supreme Court reveals a judicial attitude, consistently maintained,

that one of the most important rights guaranteed to our citizens by the Fourteenth Amendment is the right to fix between themselves the *amount* of wages to be paid and received for personal service in common employment.

Fully conscious of this history, the Attorney General of this State and the Attorney General of Ohio advance here the argument, which was submitted to the New York Court of Appeals, that "new and changing conditions create new public needs and justify new restrictions on the rights of individuals for the common good".

In this they overlook the fact that the issue here is not one of social policy but of legislative power and constitutional right.

Fundamental constitutional guaranties do not change with the ebb and flow of economic tides, or political policies.

Any intimation that the Constitution is flexible, even in response to the police power, is unsound. Its fundamental guaranties may not be struck down. Within the police power the State may legislate to meet changing conditions, providing it is done without altering fundamental principles, one of which is that no person may be deprived of his property without due process of law. If the Legislature in response to public clamor for experimental social reform, may break down these constitutional guaranties by declaring that in its "considered judgment" the law is a "health law" or a "public welfare law", all guaranties of the Constitution, under the alleged exercise of the police power, may be modified or wholly eliminated. The tendency to socialize property rights under such subterfuge is dangerous to the continuance of our free institutions.

The "new and changing conditions" which motivate the urge for "new restrictions on the rights of individuals" are not economic; they are changes in social theory and political policy by disciples of that school of thought which believes in restriction and regimentation of American citizens and American business.

The distinguished leader of this group has admitted that the powers recently sought by and granted to Government would be dangerous in the hands of officials actuated by other than benevolent motives. In Government, however, benevolent paternalism is not far removed from tyranny.

The provisions of our Constitution show full realization by the wise and far-seeing men who drafted that instrument, that the only tyranny the citizenship of this republic need fear is from the Government itself.

Alexander Hamilton wrote a warning against attempted legislative or judicial amendment of fundamental constitutional guaranties in response to public clamor. He declared it to be a "fundamental principle of Republican Government, which admits the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness, yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions of the existing Constitution, would, on that account, be justifiable in a violation of those provisions; or that the Courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act annulled or changed the established form, it is binding upon themselves collectively as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see that it would require an uncommon portion of fortitude in the Judges to do their faithful duty as guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community" (The Federalist, Chap. 78).

The argument that new and changing conditions justifies a law depriving employers and employees, in common

employments, of the right to bargain with respect to the amount of wage to be paid, fails to distinguish between legislative discretion and legislative power. They have cited many cases in support of the rule that where there is power, legislative discretion, in its exercise, will be accorded favorable presumption. As to this there is no issue. But if there is a total lack of power, the Legislature has no jurisdiction to determine for itself the possession of power, and its declaration that the law is enacted in the exercise of a power which it does not possess, is of no effect.

As this Court said in *Traux* v. *Raich,* 239 U. S. 33:

> "We have frequently said that the Legislature may recognize degrees of evil and adapt its legislation accordingly, but underlying the classification is the *authority to deal with that at which the legislation is aimed.*" (Italics ours.)

If the Legislature has the power to deprive women of freedom of contract as to the wage for which they will work, we see no reason why the same right may not be taken from men with whom women stand equal before the law and within the constitutional guaranties. No greater calamity could befall the wage earners of this country than to have the legislative power to fix wages upheld. It is paternalism in the highest degree, and if sustained will be a serious blow to the principle that the State exists for the citizens and not the citizens for the State.

Unless we jealously guard and zealously maintain the fundamental rights guaranteed in the Constitution, we shall find perhaps too late that we have sacrificed our freedom on the altar of autocracy.

We conclude with the comments of this Court in the recent case of *Jones* v. *Securities and Exchange Commission:*

"Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict. To borrow the words of Mr. Justice Day—'there is no place in our constitutional system for the exercise of arbitrary power.' Garfield v. Goldsby, 211 U. S. 249, 262. To escape assumptions of such power on the part of the three primary departments of the government is not enough. Our institutions must be kept free from the appropriation of unauthorized power by lesser agencies as well. And if the various administrative bureaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequence of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties."

We contend, therefore, that Article 19 of the Labor Law should be held void as contravening both the Federal and the State Constitutions.

Respectfully submitted,

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On the Brief.

APPENDIX.

Exhibit A.

PROPOSED ORDER OF THE MINIMUM WAGE BOARD FOR THE HOTEL AND RESTAURANT INDUSTRIES.

SEC. I. As used in this order: 1. "Hotel" means any establishment which as the whole or a part of its business or activities offers lodging accommodation for hire to more than five persons, excluding, however, establishments in which lodging accommodations are incidental to medical care, religious observance, instruction, or to the care of handicapped or destitute persons.

2. "Restaurant" means any establishment (other than a medical, religious, or educational institution, or an institution engaged in the care of handicapped or destitute persons) which prepares and offers for sale food for consumption either on any of its premises, or by catering and banquet service, or by box lunch service, or by curb service; the term "food" includes nutritive material intended for human consumption, in solid or liquid form, whether cooked or uncooked, or otherwise prepared, excluding, however, medicinal or quasi-medicinal preparations.

3. "Employee" means any female or minor person who is employed, permitted, or suffered to work in or in connection with any hotel or restaurant in service related to the furnishing of food or lodging or both.

4. "Employer" means any hotel or restaurant employing one or more employees.

5. "Service employee" means any employee whose duties relate solely to the serving of food to customers who are seated at tables and to the performance of duties

incidental to the setting of such tables, or any employee whose duties are solely those of a bell boy or page boy.

6. "Non-service employee" means any employee who is not a service employee.

7. "Resident employee" means any service or non-service employee who lives upon the premises of her employer.

8. "Hour of employment" means any hour during which an employee is subject to the directions of her employer, and includes any time devoted by an employee at her employer's request to inspection or instruction periods.

9. "Working equipment" means all uniforms, covers, aprons, collars, cuffs, and head-dresses which are worn by an employee in order to satisfy the directions of her employer as one of the requirements of her employment.

10. "Population". The population of localities within this State shall be deemed to be the same as the population therefor as shown by the latest official census.

SEC. II. Non-service employees shall be paid wages by their employers as follows:

(a) When employed in a hotel or restaurant located in a city of over 200,000 population, at the rate of not less than 27¢ for each hour of employment.

(b) When employed in a hotel or restaurant located in a city of between 10,000 and 200,000 population, at the rate of not less than 26¢ for each hour of employment.

(c) When employed in a hotel or restaurant located elsewhere in the State, at the rate of not less than 25¢ for each hour of employment.

SEC. III. Service employees shall be paid wages by their employers as follows:

(a) When employed in a hotel or restaurant located in a city of over 200,000 population, at the rate of not less than 18¢ for each hour of employment.

(b) When employed in a hotel or restaurant located in a city of between 10,000 and 200,000 population, at the rate of not less than 17¢ for each hour of employment.

(c) When employed in a hotel or restaurant located elsewhere in the State, at the rate of not less than 16¢ for each hour of employment.

SEC. IV. An employee shall be paid for each hour or fraction of an hour of her employment at the rate prescribed in this order, but in no event shall she be paid for less than three such hours in any day on which she has reported for work pursuant to her employer's instructions.

SEC. V. Time during regular working hours and at all other periods when employees are required to wait on the premises and no work is provided by the employer, shall be paid for at the employee's regular hourly wage rate. Employees who are employed on a split shift shall be compensated at their regular hourly wage rate for any time in excess of a total of three hours between the shifts worked in any one day.

SEC. VI. 1. Resident employees shall be paid wages by their employers as follows:

(a) When employed in a hotel or restaurant located in a city of over 200,000 population, in an amount not less than $9.50 for each calendar week during which such employee is in the service of such employer.

(b) When employed in a hotel or restaurant located in a city of between 10,000 and 200,000 population, in an amount not less than $9.00 for each calendar week during which such employee is in the service of such employer.

(c) When employed in a hotel or restaurant located elsewhere in the State, in an amount not less than $8.50 for each calendar week during which such employee is in the service of such employer.

2. A resident employee shall be furnished with full maintenance by such employer during the continuance of her employment.

SEC. VII. 1. No charge shall be made by an employer for any meal furnished by an employer to his employee. The term "meal" as used in this section means any food furnished by an employer to an employee while such employee is on the employer's premises as a condition of her employment.

2. Where an employee is not furnished with meals by her employer, the minimum hourly rate of cash pay to which such employee is entitled by Sections II, III and VI of this order shall be increased by the addition of six cents.

SEC. VIII. All working equipment must be furnished, repaired, and maintained at the expense of the employer. No employee shall be required to contribute directly or indirectly to the cost of such furnishing, repairing, or maintenance.

SEC. IX. No employer shall make or require any charges against or take deductions from an employee's wages for any cause of whatever description, except, by the employee's written consent, for insurance premiums or membership dues in an agreed amount.

REGULATIONS.

1. *Payment of wages.* (a) Employers shall pay the wages of their employees in cash; but an employer may pay his employees in check if he furnishes satisfactory proof to the Industrial Commissioner of his financial responsibility and gives reasonable assurance that such checks may be cashed by employees without difficulty and for the full amount for which they are drawn.

(b) Every employer shall pay at least weekly to each employee the wages earned by the employee to a day not more than six days prior to the date of such payment.

2. *Statement to employee.* Each employee subject to Director Order No. 2 shall, at the time of receiving payment of wages, be informed by the employer of the basis upon which the amount of the wage payment was determined. Such information must be given by the employer to the employee on a form prescribed by the Commissioner or in such other manner as he may determine to be suitable.

3. *Learners and apprentices.* The minimum fair wage standards which are stated in Directory Order No. 2 apply to all female and minor employees, except as otherwise provided in this regulation. No learner's or apprenticeship period shall be recognized. But for purposes of Directory Order No. 2, a "learner" shall be a person who, while a regularly enrolled student in an institution of higher learning, is required by such institution to acquire experience in hotel or restaurant problems by accepting employment in a hotel or restaurant. Application for a learner's permit, to be issued by the commissioner and to be valid for such period as he may determine, must be made to the commissioner on a form furnished by him and must be accompanied by such proofs of the applicant's status as the commissioner may require. Directory Order No. 2 shall not be deemed

applicable to persons to whom a learner's permit has been issued.

4. *Fractions of hours.* Time worked shall be reckoned to the nearest unit of fifteen minutes. Illustration: If employee A works seven hours and ten minutes, A is entitled to wages for 7¼ hours; if Employee B works seven hours and twenty minutes, B is entitled to wages for 7¼ hours.

5. *Insurance and membership charges.* No charge shall be made or deduction taken from any employee's wages for insurance premiums or membership dues, until the employer's application for permission to make such charge or deduction has been received and approved by the Division of Minimum Wage, and a special permit issued and posted accordingly. Always provided, however, that where any such charge or deduction has been customarily made by the employer prior to the date of taking effect of Directory Order No. 2 and where the employer makes application for permission to make such charge or deduction within ninety days of the date of taking effect of Directory Order No. 2, any such charge or deduction may continue to be made until the employer's application has been disapproved by the Division of Minimum Wage.

6. *Contributions for busboys.* No employer shall exact from an employee any sum to be paid to a busboy or other employee of such employer, nor determine any sum so to be paid, nor designate any employee to collect any such sum from any other employee, nor require any employee directly to pay or to contribute any such sum.

7. *Lodgings to be approved.* No employer shall be privileged to employ resident employees unless such employer is registered with the Division of Minimum Wage. Such registration shall be made in a form prescribed by the Com-

missioner. Registration may be cancelled by the Division of Minimum Wage whenever it determines, after appropriate notice and hearing, that the lodging or food furnished or proposed to be furnished by an employer to his resident employees is not sanitary and of good quality. The Division of Minimum Wage may make such inspections and require such information as it may deem necessary to assist it in making such determinations.

8. No variations permitted. No employee as a condition of employment may be required to accept any variation from the requirements of Directory Order No. 2 or of these regulations.

9. *Certificate of age.* For purposes of this order each employer shall keep on file a certificate of proof of age for each male minor employee. "Minor", as used in Directory Order No. 2 and in these regulations, means a person of less than twenty-one years in age.

10. *Records.* Each employer shall keep a record, in a form satisfactory to the Commissioner, of the name and address of each of his employees, showing the hours worked daily and the wages received each week by each such employee and of lodgings and meals furnished, and deductions, if any, during the preceding twelve months' period; and shall, on demand of the Commissioner, submit a sworn copy of such record to the Commissioner, together with such other information as the Commissioner may deem necessary to assure compliance with Directory Order No. 2.

11. *Posting.* A notice issued by the commissioner, setting forth the provisions of Directory Order No. 2 and regulations pertaining to it, shall be posted conspicuously in the place of business of each employer. The commissioner may require an employer to post more than one copy of such notice if he deems such posting necessary to acquaint employees with the contents of the notice.

NOTE.

The employer members of the Wage Board unanimously opposed the foregoing order, for reasons apparent in the order itself.

Sections II and III fix a differential between non-service and service employees of 9¢ per hour to cover the estimated gratuities received by service employees. A flat rate per hour is fixed for all non-service employees, doing a great variety of work, without regard to the character of the work, the skill required, the experience, ability or industry of the worker, the value of the work to the employer, the condition of his business, or the varying grades of employees required by the character of the establishment and of its patronage.

The only other differential is based upon geographical location, in deference to the varying living costs in the communities for which the differentials are established. In Section VI, applicable to resident employees, a like geographical differential is established for large cities, small cities and elsewhere, based on living cost. Otherwise the rate is the same for all classes of employees both non-service and service, regardless of gratuities received by the latter and of all other factors affecting value.

Section III, paragraph a, of the proposed wage order prescribes an hourly wage rate for waitresses (service employees) in cities of 200,000 or more of 18¢ if meals are furnished and 24¢ if meals are not furnished. This applies to them as a class regardless of how many or what kind of meals are furnished, the ability or experience of the employee, the character of the place in which she works, or the additional remuneration she receives in tips, which latter will vary greatly in amount according to the establishment and class of patronage therein.

To argue that this is a fair quantum meruit wage is obviously absurd. Under this scale assume that two waitresses work in two different establishments forty-four hours in one week and that they are of equal ability and skill. Each will receive cash wages from the employer of

$7.92. One may receive two meals, the other three meals per day. One may receive good meals and the other bad. One may receive, owing to the character of the establishment, $5.00 or $6.00 a week in tips and the other, where the patronage is of a different character, may receive $15.00 or $20.00 a week.

In any action to recover compensation on a quantum meruit basis, all these factors would be considered, and that they vary greatly in individual cases must be admitted. This shows how utterly impossible it is to fix a wage for a class on a quantum meruit basis.

This situation is not due to any failure by the Board to follow the law which delegates to wage boards and to the Commissioner the power and authority to fix what they deem to be a fair wage, based upon what they may (or may not) take into consideration according to their discretion which is not controlled by any definite standard fixed by the law.

Section 551 defines a fair wage as one which is "fairly and reasonably commensurate with the value of the service or class of service rendered".

Under paragraph 4 of Section 555 the Board "shall submit a report including its recommendations as to minimum fair wage standards". It appears, therefore, that the law delegates to the Board authority to determine as a fact (with no right of appeal), and to fix, its own standards, unhampered by any mandatory provision other than that contained in Section 552, which outlaws the employment of any woman at a wage which is less than the fair value of her services and less than sufficient to meet the minimum cost of living necessary for health.

Fair value of service is so variable that it cannot be standardized for any general class of workers. This law delegates authority not only to fix the amount of wages, but to fix its own standard therefor. This being so, no citations are necessary in support of the contention that it is void for this reason alone, without regard to its other constitutional infirmities.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1935

No.

FREDERICK L. MOREHEAD, as the Warden of the City Prison of the Borough of Brooklyn,

Petitioner,

vs.

PEOPLE ex rel. JOSEPH TIPALDO,

Respondent.

PETITION OF THE ATTORNEY GENERAL OF THE STATE OF ILLINOIS, AS AMICUS CURIAE

OTTO KERNER,
Attorney General of the State of Illinois, as Amicus Curiae.

DANIEL D. CARMELL,
Assistant Attorney General of the State of Illinois,
Chicago, Illinois.

State Law Printing Company, 173 W. Madison St., Chicago—FRAnklin 5501

IN THE

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vs.

PEOPLE ex rel: JOSEPH TIPALDO,

Respondent.

PETITION OF THE ATTORNEY GENERAL OF THE STATE OF ILLINOIS, AS AMICUS CURIAE

Now comes OTTO KERNER, Attorney General for the State of Illinois, as Amicus Curiae, and represents to this Court that the General Assembly of the said State of Illinois did enact a law entitled—

> "An Act in relation to minimum fair wage standards for women and minors, and providing penalties for violation thereof" (Smith-Hurd Illinois Revised Statutes 1935, Chapter 48, Sections 198 to 216)

which was approved by the Governor of said State on July 6, 1933.

Your petitioner further represents that the said Act is identical in form and substance with an Act of the State of New York, entitled the MINIMUM WAGE LAW FOR WOMEN (Law 1933, Ch. 584, in effect April 29, 1933).

Your petitioner further represents that there has heretofore been filed a Petition for a Writ of Certiorari in this court, in the above entitled cause, presenting to this Court issues which involve the constitutionality of the Illinois Minimum Wage Law.

Wherefore your petitioner prays that the Petition for a Writ of Certiorari filed by the Attorney General of the State of New York be granted, to the end that issues therein may be determined by this Court, in which issues the State of Illinois is vitally concerned.

Respectfully submitted,

OTTO KERNER,
Attorney General of the State of Illinois, as Amicus Curiae.

DANIEL D. CARMELL,
Assistant Attorney General of the State of Illinois.

Chicago, Illinois.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

No. 838. October Term, 1935

FREDERICK L. MOREHEAD, as the Warden of the City Prison of the Borough of Brooklyn,

Petitioner,

against

PEOPLE *ex rel.* JOSEPH TIPALDO,

Respondent.

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

March 25, 1936.

PAUL WINDELS,
Corporation Counsel of the City of New York,
Amicus Curiae.

PAXTON BLAIR,
PAUL J. KERN,
of Counsel.

Supreme Court of the United States

No. 838. October Term, 1935

FREDERICK L. MOREHEAD, as the Warden of the City Prison of the Borough of Brooklyn,

Petitioner,

against

PEOPLE *ex rel.* JOSEPH TIPALDO,

Respondent.

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI.

Preliminary Statement.

The legislation which the Court of Appeals of the State of New York held in contravention of the Fourteenth Amendment made it a misdemeanor for employers in certain industries to pay their female employees wages less than those fixed by certain mandatory minimum fair wage orders issued by the Industrial Commissioner of the State of New York. L. 1933, ch. 584. The specific offense committed by the relator-respondent was the crime of forgery in that he falsified his books to conceal his non-compliance with the minimum wage law.

Since the pleadings show that only the Federal Constitution was relied on by the relator-respondent to secure his discharge, and since *Adkins* v. *Children's Hospital*, 261 U. S. 525 (1923), was not only the foundation stone but the superstructure as well of the opinion below, this Court has jurisdiction to grant the writ. *Red Cross Line* v. *Atlantic Fruit Company*, 264 U. S. 109, 120 (1924); *Blodgett* v. *Silberman*,

277 U. S. 1, 7 (1928). Furthermore, when a State Constitution and the United States Constitution employ the same phrase, the mimetic conduct of a State court of last resort in deciding, on the authority of a decision of this Court construing the United States Constitution, that a given statute offends both constitutions cannot, in the last analysis, be said to rest upon a State ground adequate to support it.

The interest of the City of New York in sustaining the constitutionality of the minimum wage law is two-fold.

(1)

In the first place, when non-subsistence wages are paid to any persons, the burden of preventing the starvation or debilitation and susceptibility to disease which would otherwise overtake such persons falls upon the public welfare agencies of the locality where such persons reside. Actually the Department of Public Welfare of the City of New York each month expends more than $9,000,000 (partially State contributed) in assisting those who are unable to support themselves. A large part of this sum is expended to supplement privately earned incomes which, while representing the total earning capacity of the recipient, are still grossly inadequate for the support of the family unit depending thereon. Of this portion a large amount is spent for the assistance of women who, although employed, are still unable to support themselves due to the substandard wages of private business.

A survey made in October, 1935 (15 N. Y. Indust. Bul. 40) of 280,568 families aided by the Department of Public Welfare revealed in such families 4,008 women who, though employed in industry, were unable to support themselves out of their wages and were compelled to appeal to t[illegible]

Department for aid. The statute under attack gives the Industrial Commissioner power to correct this situation.

Public funds were thus diverted from the relief of the unemployed and the physically helpless to the relief of those whose employers neglected or refused to pay them a living wage. The result is a shocking and indefensible compulsion exercised upon the City to subsidize unconscionable employers who, were the challenged statute upheld, would be required to pay their workers at least at subsistence levels.

Statistics of families wherein school children required aid from the National Youth Administration revealed that of 413 aided families (whose children attended a single school), there were in 88 of them women employed at non-subsistence wage levels. One-half of these women were receiving less than $10 a week.

In the laundry business, the survey revealed over one-half of the workers receiving an average of less than $10.00 a week, the subsistence level being $11.00. Under the assailed statute, however, conditions were improved so that only 9% were receiving less than the subsistence figure.

In the restaurant business, the survey revealed 6,239 women workers receiving an average of $8.28 a week. Over 17% were paid under $4.00.

(2)

In the second place, the City is interested in sustaining the assailed legislation because it tends to eliminate police and health problems which accompany the payment of sub-standard scales of wages.

Much that was said in *Matter of New York City Housing Authority* v. *Muller*, 270 N. Y. (Mar. 17, 1936), is applicable here. The Court of Appeals there upheld a statute

which authorized the use of public funds and the power of eminent domain to clear slums and erect sanitary low-price tenements in their stead. The Court said:

> "Slum areas are the breeding places of disease which take toll not only from denizens, but, by spread, from the inhabitants of the entire city and State. Juvenile delinquency, crime and immorality are there born, find protection and flourish. Enormous economic loss results directly from the necessary expenditure of public funds to maintain health and hospital services for afflicted slum dwellers and to war against crime and immorality. Indirectly there is an equally heavy capital loss and a diminishing return in taxes because of the areas blighted by the existence of the slums. Concededly, these are matters of State concern (*Adler* v. *Deegan*, 251 N. Y. 467, 477), since they vitally affect the health, safety and welfare of the public."

Workers who are paid non-subsistence wages are forced to live in slums, or in slum conditions. Legislation aimed to raise their wages to subsistence levels will operate to lessen the slum problem.

Conclusion.

We ask this Court to grant a writ of certiorari herein in order that the doctrine of *Adkins* v. *Children's Hospital*, 261 U. S. 525 (1923) may be inquired into afresh, and the attention of the Court focussed upon the one outstanding, publicly recognized and acknowledged development of the last decade: *i. e.*, the now incontrovertible fact that non-subsistence wages operate in the long run as an outrageous burden upon public welfare agencies, and as a shocking

subsidy to those employers who by reason of their selfishness and greed are the last persons in the world entitled to claim to be the recipients of public aid.

Dated, New York, N. Y., March 25, 1936.

Respectfully submitted,

PAUL WINDELS,
Corporation Counsel of the City of New York,
Amicus Curiae.

PAXTON BLAIR,
PAUL J. KERN,
of Counsel.

Supreme Court of the United States

No. 838—October Term, 1935.

FREDERICK L. MOREHEAD, as the Warden of the City Prison of the Borough of Brooklyn,

Petitioner,

against

PEOPLE *ex rel.* JOSEPH TIPALDO,

Respondent.

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF REVERSAL.

April 24, 1936.

PAUL WINDELS,
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PAXTON BLAIR,
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of Counsel.

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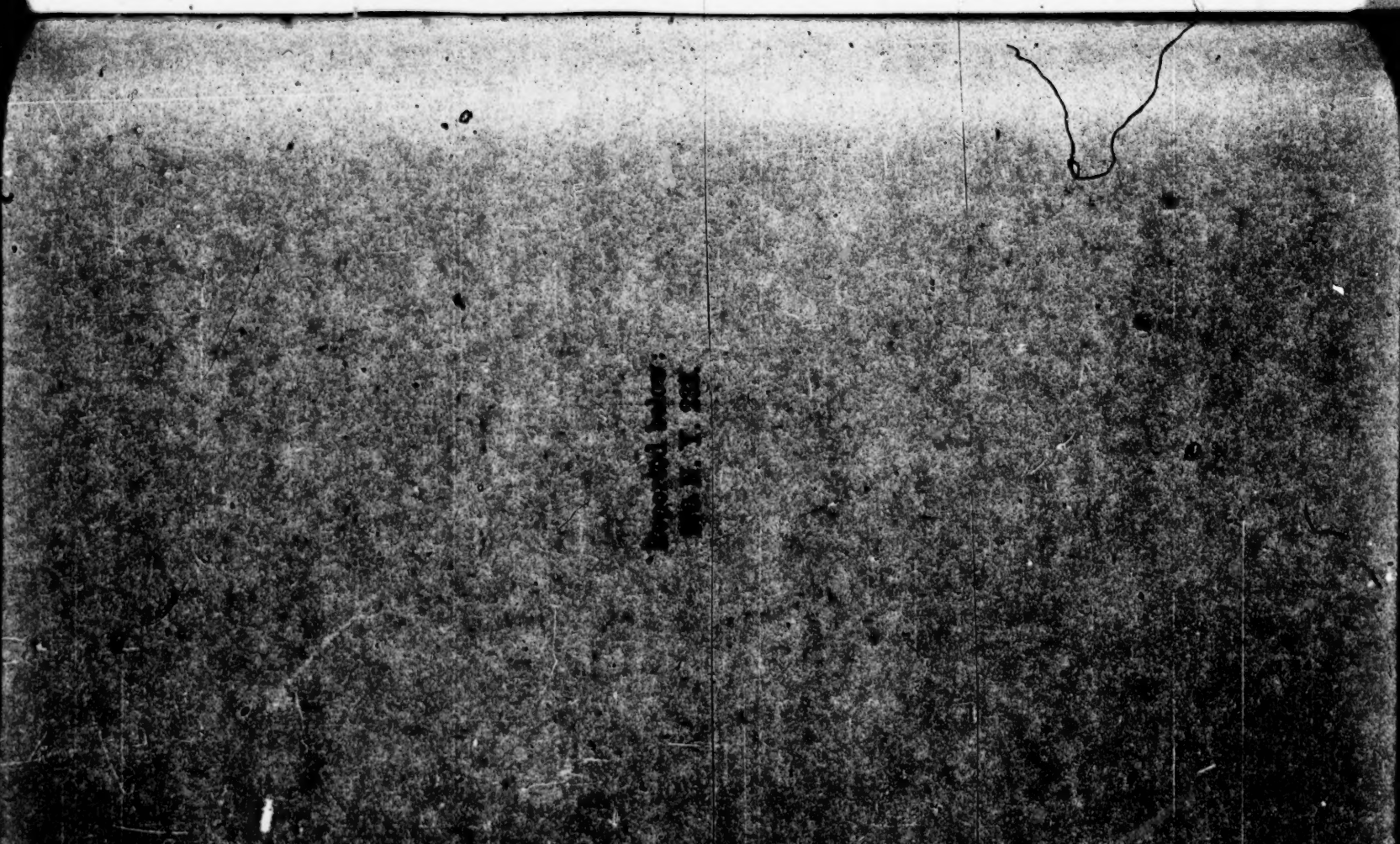

Supreme Court of the United States

No. 838—October Term, 1935.

FREDERICK L. MOREHEAD, as the Warden of the City Prison of the Borough of Brooklyn,

Petitioner,

against

PEOPLE *ex rel.* JOSEPH TIPALDO,

Respondent.

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF REVERSAL.

Preliminary Statement.

It is the purpose of this brief to discuss briefly the constitutional question and to show certain conditions prevalent in the City of New York, where a majority of the persons affected by the challenged legislation (N. Y. Laws 1933, ch. 584) live and work, and where the nullification of that legislation would be attended by consequences of unusual gravity.

POINT I.

The prevention of indigency, the lifting of burdens on public welfare agencies and the maintenance of decent living conditions justify the challenged legislation and render it constitutional.

An astute writer on public affairs has said:

> "It has, I think, been clearly established that government must henceforth hold itself consciously responsible for the maintenance of the standard of life prevailing among the people. This is, I believe, a new imperative which takes its place alongside the older imperatives to defend the nation against attack and to preserve domestic peace." WALTER LIPPMANN, *The New Imperative* (1935), p. 1. And see *id.*, pp. 14, 34.*

The foregoing synthesis is in harmony with the observations on minimum wage legislation made many years ago by COMMONS and ANDREWS, *Principles of Labor Legislation* (Rev. Ed., 1927), p. 195, where they said:

> "Work may be done under safe and sanitary conditions for hours not too long, and payment of wages may be prompt and regular, but if the amount received is too small to secure the necessaries of life, the worker's health and welfare are menaced."

Moreover, among the various types and examples of social legislation designed to rescue the laboring classes

* See also MORTISHED, *The Social Basis of World Order*, in *Problems of Peace, Tenth Series* (1936), where it is said (p. 104): "* * * you cannot have good government unless you have good citizens, and * * * you cannot have good citizens, unless you have good social conditions."

from the consequences of the inequality of their bargaining power *vis-à-vis* the employers, minimum wage legislation stands in a place apart because it has the fortunate attribute of helping the employer as much as it helps the laborer. In the last cited work, this was clearly stated (pp. 198-199):

> "Moreover, a socially undesirable type of competition between employers flourishes when the bargaining power of employees is weak. The encouragement of superior ability and invention has always been pointed out as one of the chief advantages gained by the community from the competitive system of production. When an employer can hire workers for practically his own price, he can be slack and inefficient in his methods, and yet, by reducing wages, reduce his cost of production to the level of his more able competitor.
>
> Minimum wage legislation, therefore, is designed to answer the demands of social policy in two ways. By setting a barrier below which wages may not fall, it lightens the pitiful poverty and prevents the degeneration in body and spirit of those forced to live on a wage too small to supply the necessaries of life. Competition among them no longer takes the form of offering to work for lower wages, but that of developing greater efficiency. At the same time, employers are forced to compete in efficiency of management, thus securing for society at large the many advantages of constantly improved methods of production. Minimum wage laws attempt neither to destroy competition nor to fix wages by law; they merely seek to set the lower limits to both in the interests of society as a whole."

The foregoing factors are recognized in the instant statute, § 550, sixth sentence.

The legislation would therefore seem to possess certain claims to constitutionality not possessed either by the

Adamson Law (39 Stat. 721) or by the New York Emergency Rent Law, to both of which this Court has given its approval. *Wilson* v. *New*, 243 U. S. 332 (1917); *Marcus Brown Holding Co.* v. *Feldman*, 256 U. S. 170 (1921). For in both these cases there was really no *quid pro quo* conferred on the employers and the landlords.

Nor do the foregoing instances exhaust the list of constitutional statutes furnishing analogies (of varying degrees of closeness) to the statute now before the Court.

The inarticulate major premise is stated in the quotation from Lippmann, *supra*, page 2. It might also be stated thus: The legislature, aiming to reduce the constant risk to which the general public is exposed that persons may become public charges, accomplishes this by increasing the catalogue of relational duties, so as to dissipate the risk referred to. If this can be accomplished by finding somebody on whom the prospective *public* charge can be imposed as a *private* charge or personal liability, then any legislation adapted to that end, should, if the parties are so situated by virtue of existing statutory precedents as to bear a relational rather than a contractual duty toward each other, be sustained as constitutional.

We acknowledge that the foregoing involve two admissions, both of which we make without hesitation. One is that between employer and employee, liberty of contract has already become a "vanishing fiction".* The other is that, within that field, the modern movement is from contract to status, Sir HENRY MAINE's thesis (*Ancient Law*, ch. V, *ad fin.*) having been reversed.†

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* We borrow the phrase from *Williamson* v. *Osenton*, 232 U. S. 619, 625 (1914), where it was used in a different connection. See also *Bosley* v. *McLaughlin*, 236 U. S. 385, 392 (1915).

† See HAROLD J. LASKI, *The Pluralistic State*, 28 Philosophical Rev. 562, 568 (1919).

Returning to our analogies among statutes designed to prevent a multiplication of public charges, we find workmen's compensation laws readiest to hand. Injuries occurring without fault of the employer, and hence non-compensable on common law principles, made the injured individual a public charge. The legislature passes the burden on to the industry, and the statute is sustained because the employer is simply being made to bear the burden of injuries primarily, if not proximately, caused by the employment. *New York Central R. Co.* v. *White*, 243 U. S. 188, 205 (1917).

In the case just cited, Mr. Justice PITNEY in upholding the New York Workmen's Compensation Law (L. 1913, ch. 816, as amended) referred with apparent approval to the general principles put forward by the Attorney-General, Mr. Woodbury, to justify the law against constitutional challenges. In his opinion he said (243 U. S., at p. 197):

> "In support of the legislation, it is said * * * that under the present system the injured workman is left to bear the greater part of industrial accident loss, which because of his limited income he is unable to sustain, so that he and those dependent on him are overcome by poverty and frequently become a burden upon public or private charity; * * *."

By parity of reasoning, we ask this Court to deem the statute at bar justified as an endeavor on the legislature's part to prevent women from becoming "a burden upon public or private charity". And it is unnecessary to remind this Court that there "is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations

are based upon adequate grounds." *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, 157 (1919).

Related to workmen's compensation laws by the common feature of distribution of risk in such a way as to reduce the likelihood of a class of people becoming public charges is the recent New York State pay-roll tax law, L. 1935, ch. 468. This was declared constitutional in *Chamberlin, Inc.* v. *Andrews*, 271 N. Y. (April 15, 1936), and CRANE, Ch. J., in the course of the opinion which he wrote for the majority of the Court said:

> "The fact is that in the past few years enormous sums of State and Federal moneys have been spent to keep housed and alive the families of those out of work who could not get employment. Such help was absolutely necessary, and it would be a strange sort of government, in fact no government at all, that could not give help in such trouble.
>
> The Legislature of the State, acting after investigation and study upon the report of experts, has proposed what seems to it a better plan. Instead of solely taxing all the people directly, it has passed a law whereby employers are taxed for the help of the unemployed, the sums thus paid being cast upon the public generally through the natural increase in the prices of commodities. Whether relief be under this new law of the Legislature or under the dole system the public at large pays the bill."

The prevention of indigency and the attendant increased burden on public welfare agencies were doubtless the motivating force behind the legislature in passing an act prohibiting the assignment of wages to become due, which this Court sustained in *Mutual Loan Co.* v. *Martell*, 222

U. S. 225 (1911). The same force may be perceived, though less obviously, in the bank deposit guaranty statutes, of which an early example was upheld in *Noble State Bank* v. *Haskell*, 219 U. S. 104 (1911).

The legislation before the Court has a further merit. It tends to eliminate police and health problems which accompany the payment of oppressive scales of wages.

Much that was said in *Matter of New York City Housing Authority* v. *Muller*, 270 N. Y. 333 (1936), is applicable here. The Court of Appeals there upheld a statute which authorized the use of public funds and the power of eminent domain to clear slums and erect sanitary low-price tenements in their stead. The Court said (p. 339):

> "Slum areas are the breeding places of disease which take toll not only from denizens, but, by spread, from the inhabitants of the entire city and State. Juvenile delinquency, crime and immorality are there born, find protection and flourish. Enormous economic loss results directly from the necessary expenditure of public funds to maintain health and hospital services for afflicted slum dwellers and to war against crime and immorality. Indirectly there is an equally heavy capital loss and a diminishing return in taxes because of the areas blighted by the existence of the slums. Concededly, these are matters of State concern (*Adler* v. *Deegan*, 251 N. Y. 467, 477), since they vitally affect the health, safety and welfare of the public."

Workers who are paid oppressive wages are forced to live in slums, or in slum conditions. Legislation aimed to raise their wages to subsistence levels will operate to lessen the slum problem.

POINT II.

Conditions in New York City show the reality of the factual background portrayed in the preface to the statute (§ 550), and the grave consequences to be anticipated should it be overthrown.

(1)

It is a very obvious truth that when women are working full time for an employer and are not being paid a subsistence wage, the difference must come from some other source if life is to be maintained. That other source logically and normally is the nearest public welfare agency.*

The annual budgetary appropriation for the Department of Public Welfare of New York City in 1923 was $7,910,086.71. In 1935 it was $278,354,864.80.† The imperative necessity of doing something to keep this figure, already astronomical, from growing even larger must be obvious to every mind.

The direct burden upon public welfare agencies is made clear by the circumstance that between May and September, 1935, the Emergency Relief Bureau in New York City found it necessary to aid 4,254 women who were actually in employment, but whose average earnings were but $7.63 per week.‡

Furthermore, a survey made in October, 1935, and described at length in the Industrial Bulletin of the State of New York (Vol. 15, p. 40), showed that in 280,568

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* The burden upon public welfare agencies resulting from the payment of oppressive wage scales is a recognized justification for minimum wage laws. See COMMONS and ANDREWS, *op. cit.*, p. 212.

† This figure includes appropriations allocated to the City by the State and the Federal governments. In March, 1936, the Department expended $9,468,452.06 on relief. This figure does not take into consideration the contribution of the Federal Government, the expenditure of which is made under the direction of the Works Progress Administration.

‡ See petitioner's Factual Brief, page 177.

families aided by the Department of Public Welfare there were 4,008 women who, though employed in industry, were unable to support themselves out of their wages and were compelled to appeal to the Department for aid. The statute under attack gives the Industrial Commissioner power to correct this situation.

Public funds were thus diverted from the relief of the unemployed and the physically helpless to the relief of those whose employers neglected or refused to pay them a living wage. The result is a shocking and indefensible compulsion exercised upon the City to subsidize unconscionable employers who, were the challenged statute upheld, would be required to pay their workers at least at what the State has found fair.

(2)

The National Youth Administration, an organization whose purpose is to aid needy persons between the ages of 16 and 25 who are no longer in regular attendance at a school requiring full time,* has compiled statistics of 616 aided public school students in the five boroughs of Greater New York, where the pupil belonged to a family containing at least one fully employed woman. In 309 of the cases (or over 50%) the women were paid less than $11 a week, the level found by the Public Welfare Council to be the subsistence level.†

The cases of high school students whose families received aid from this organization (in February, 1936) have been tabulated with the following results:

---

* Organized under Executive Order No. 7086, dated June 26, 1935. This Order was issued pursuant to authority conferred by U. S. Code, Tit. 15, § 728, sub-sec. 1 (49 Stat. 115).

† To the determination of this level intensive study has been given by welfare agencies for years. The Charity Organization Society currently places it at $10.25; the Jewish Social Service Association at $10.05; and the Emergency Relief Bureau at $10.00. In 1926 the National Industrial Conference Board placed it at $12.80.

High School	*Families Aided*	*Female Wage Earners*	*Average Weekly Wage*
MANHATTAN:			
Benjamin Franklin	105	9	$13.77
Haaren	315	42	8.52
Commerce	201	27	10.78
Julia Richman	413	88	10.10
Seward Park	360	35	13.71
Stuyvesant	120	14	13.90
Wadleigh	387	50	7.86
Washington Irving	179	29	11.70
BRONX:			
De Witt Clinton	145	27	10.20
Evander Childs	156	20	12.63
James Monroe	310	30	13.40
Morris	130	2	7.50
Theodore Roosevelt	214	9	11.88
Walton	80	10	12.98
BROOKLYN:			
Abraham Lincoln	131	7	14.93
Alexander Hamilton	63	6	8.92
Bay Ridge	42	7	13.36
Boys'	72	8	13.02
Brooklyn Technical	127	14	12.64
Bushwick	98	14	8.53
Eastern District	195	20	9.85
Erasmus Hall	52	7	11.36
F. K. Lane	124	11	13.23
Girls'	58	8	10.25
James Madison	55	7	12.35
Manual Training	104	16	11.41
New Utrecht	120	14	12.37
Samuel J. Tilden	124	9	12.99
Thomas Jefferson	89	11	15.27

High School	*Families Aided*	*Female Wage Earners*	*Average Weekly Wage*
QUEENS:			
Far Rockaway	35	9	$13.72
Grover Cleveland	73	9	9.19
Jamaica	104	17	9.38
John Adams	81	1	9.00
Newtown	55	6	16.09
Richmond Hill	36	4	10.50
RICHMOND:			
Curtis	55	5	12.80
Tottenville	53	6	14.30
Port Richmond	9	2	6.80

The average of all the figures in the right-hand column is $11.61. But taking the boroughs separately it falls below $11.00 (the subsistence level) in all the boroughs except Brooklyn and Richmond. The latter is the smallest of the five boroughs.

(3)

That oppressive wages drive their recipients to the public welfare agencies would seem to be demonstrative of the unsoundness of putting the sale of personal services on a parity with the sale of goods. The merchant who is unsuccessful can always turn from one line of goods to another, or give up merchandising and become a manual laborer; for the "new imperative" does not contemplate maintaining him in the higher status once he has failed. But if manual labor is his sole means of livelihood, he has no place to which to retreat if that fails to keep him alive. All he can do is to reduce his standard of living,—with con-

sequences not confined to himself, as *Matter of New York City Housing Authority* v. *Muller, ante*, p. 7, shows. Hence the unsuccessful seller of services (*i. e.*, the worker paid at non-subsistence wages) has, by virtue of the lack of alternatives before him, a claim to aid from the legislature which the unsuccessful merchant has not.

(4)

The Department of Correction of the City of New York has recently investigated over 150 cases of women arrested for vagrancy or for soliciting on the public streets employment as prostitutes. This survey reveals the following antecedent employments and wage scales as factors presumably contributing to the woman's taking up prostitution:*

Antecedent Employment	*Number*	*Wage Range (Per Week)*	*Average*
Waitress	18	$5 to $18	$8.50
Laundry worker	10	$4.80 to $15	10.88
Factory worker	11	$7 to $14	11.77
Miscellaneous	16	$4.50 to $18	9.79
	55		

(5)

Reduced to its lowest terms, the argument which we maintain is supported by the data hereinbefore set forth is that *industries ought to be self-supporting or quit.* Subsidies are legitimate and desirable when paid openly to concerns rendering a public service yet incapable of earning adequate income. But no industry has the right to avoid a

* Cases where antecedent employment was as a domestic servant or other occupation not covered by minimum wage legislation are omitted.

deficit or add to its profits by forcing an indirect subsidy from the public treasury. An industry which does so merits condemnation; and a statute which prevents the diversion, to unworthy recipients, of funds intended for the helpless and the jobless is as clearly constitutional as a statute which punishes larceny or frauds upon the government.

Conclusion.

The order of the Court of Appeals should be reversed and that of the Supreme Court, Kings County, affirmed.

Dated, April 24, 1936.

Respectfully submitted,

PAUL WINDELS,
Corporation Counsel of the City of New York,
Amicus Curiae.

PAXTON BLAIR,
PAUL J. KERN,
of Counsel.

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IN THE

Supreme Court of the United States

No. 838.

FREDERICK L. MOREHEAD, AS THE WARDEN OF THE CITY PRISON IN THE BOROUGH OF BROOKLYN,

Appellant,

vs.

PEOPLE, EX REL. JOSEPH TIPALDO,

Appellee.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF IN SUPPORT THEREOF.

JOHN W. BRICKER,
Attorney General of Ohio,
Counsel for the State of Ohio, as Amicus Curiae.

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TOOTHAKER & RODENFELS, Law Printers, Columbus, Ohio.

INDEX.

Motion for leave to file brief as amicus curiae..... 1
Preliminary statement 2
Point of law involved..... 6
Summary of argument..... 7
Argument 10

1. The Fourteenth Amendment to the Constitution of the United States is not intended to interfere with the reasonable exercise of the police power of the state to enact laws for the protection and promotion of the public health, peace, morals, safety and welfare, provided such legislation is reasonable and has a real and substantial relation to the public object sought to be accomplished.... 10

2. The due process clause of the Fourteenth Amendment to the Constitution of the United States cannot be construed to destroy the police power of the state, nor can the police power of the state be exercised contrary to the Fourteenth Amendment..... 11

3. The right and liberty of contract, including contracts between employer and employe, is not a universal or unlimited right, and it may be regulated whenever necessary for the public good or welfare..... 12

A. There is no such right as absolute liberty of contract 13

B. The right and liberty to contract between an employer and his employe may be regulated for the public good or welfare 13

4. The Legislature determines the necessity of legislation for the promotion of the public welfare and the appropriate measures to remedy existing evils inimical to the public welfare. In determining the validity of such a measure the court is concerned only with the power of the Legislature to enact the statute and is not concerned with the policy, the wisdom, the expediency, or the fairness of the legislation..... 15

A. Enactment of minimum wage laws for women and minors in sixteen states clearly discloses an existing evil in reference to the wages of such employes..... 16

5. There is a presumption that legislation is constitutional until the contrary clearly appears 18

6. A minimum wage law passed by a state Legislature which permits the fixing of a minimum fair wage for women and minors, such wage being fixed at the reasonable value of the services rendered, in those industries where it is found that oppressive and unreasonable wages are being paid to a substantial number of women and minors, is an act which relates to and promotes the public health, welfare and safety, and is a reasonable and valid exercise of the police power of a state and violates no provision of the Constitution of the United States..... 19

A. The economic evils confronting the states . 20

B. Public welfare requires a state to protect the health of women and minors gainfully employed 28

C. Oppressive and unfair wages deter women and minors who are receiving public relief from seeking employment... 29

D. Police power may be exercised to prevent unfair competition..... 30

E. This Court has on many occasions held that the police power of a state can be exercised to encourage fair competition and to prevent unfair competition..... 35

F. Police power may be exercised to prevent imposition, exploitation and fraud..... 37

7. The New York Minimum Wage Law, passed in the light of the decision of Adkins v. Children's Hospital, 261 U. S., 525, is supported as to constitutionality by the opinion in that case 39

Conclusion 48

Appendix A 50

Table III—Proportion of females 10 years old and over gainfully occupied, by age, Ohio, 1900 and 1930 50

Appendix B 51

1. Average (or median) wages per week for females [illegible] males in woman-employing industries in Ohio, 1929, 1932 and 1934 51

2. Proportion of males and females with weekly rates of less than $10 and $20 and over, in 16 woman-employing industries in Ohio, 1929, 1932, and 1934 52

Cases Cited.

Adkins v. Children's Hospital, 261 U. S., 525 ..... 9, 40, 41, 44, 46, 48

Advance-Rumely Thresher Co., Inc., v. Jackson, 287 U. S., 283 13

Appalachian Coals, Inc., v. United States, 288 U. S., 344, 360 35

Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S., 548, 558 11

Barbier v. Connolly, 113 U. S., 27, 31 10

Bloch v. Hirsh, 256 U. S., 135 13

Booth v. Illinois, 184 U. S., 425, 429 16
Borden's Farm Products Company, Inc., v. Baldwin, 293 U. S., 194 18
Bosley v. McLaughlin, 236 U. S., 385 28
Bradwell v. Illinois, 16 Wall., 130 28
California Reduction Co. v. Sanitary Reduction Works, 199 U. S., 306, 319 18
Central Lumber Company v. South Dakota, 226 U. S., 157 36
Chicago B. & Q. R. Co. v. McGuire, 219 U. S., 549 ..... 11, 13, 16
Erie Railroad Co. v. Williams, 233 U. S., 685 14
Fairmont v. Minnesota, 274 U. S., 1 19
German Alliance Insurance Co. v. Lewis, 233 U. S., 389 ..... 16, 17, 33
Gorieb v. Fox, 274 U. S., 603, 608 16
Griffiths v. Connecticut, 218 U. S., 563 38
Hall v. Geiger-Jones Company, 242 U. S., 539 37
Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co., 284 U. S., 151 13
Holden v. Hardy, 169 U. S., 366 ..... 13, 16
Home Building & Loan Association v. Blaisdell, 290 U. S., 398 11
Hutchinson Ice Cream Company v. Iowa, 242 U. S., 153 37
Jacobson v. Massachusetts, 197 U. S., 11, 30 16
Keokee v. Taylor, 234 U. S., 224 13
Knoxville Iron Co. v. Harbison, 183 U. S., 13 13
Lawton v. Steele, 152 U. S., 133, 136 16
Legal Tender Cases, 12 Wall., 457, 551 13

Louisville & Nashville Railroad Co. v. Milton, 218 U. S., 36, 52 10
McLean v. Arkansas, 211 U. S., 539.....10, 13, 14, 16
Miller v. Wilson, 236 U. S., 373..... 28
Munn v. Illinois, 94 U. S., 113..... 33
Muller v. Oregon, 208 U. S., 412.....10, 14, 16, 28
Murphy v. California, 225 U. S., 623..... 10
Murphy, Attorney General of Arizona, v. A. Sardell, 269 U. S., 530..... 40
Nebbia v. New York, 291 U. S., 502.....
.....10, 13, 16, 25, 33, 34, 35, 36
New Orleans Gas Light Co. v. Louisiana Light Co., 115 U. S., 650..... 10
N. Y. & N. E. R. R. Co. v. Bristol, 151 U. S., 556, 567. 13
O'Gorman and Young v. Hartford Fire Insurance Company, 282 U. S., 251, 252..... 18
Patterson v. The Eudora, 190 U. S., 169..... 14
Peterson Baking Co. v. Bryan, 290 U. S., 570..... 37
People ex rel. Selz v. Hesterberg, 211 U. S., 31..... 16
Powell v. Pennsylvania, 127 U. S., 678..... 10
Radice v. New York, 264 U. S., 292.....16, 28
Schmidinger v. Chicago, 226 U. S., 578, 579.....13, 37
Sinking Fund Cases, 99 U. S., 700, 718..... 18
St. Louis Iron Mt. Ry. v. Paul, 173 U. S., 404..... 14
Strathearn Steamship Co. v. Dillon, 252 U. S., 348... 14
Sturges & Burn Manufacturing Co. v. Beauchamp, 231 U. S., 320..... 28
Whitfield v. State of Ohio, decided March 2, 1936.17, 32

IN THE

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Appellant,

vs.

PEOPLE, EX REL. JOSEPH TIPALDO,

Appellee.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

May It Please the Court:

The undersigned, as counsel for the state of Ohio, respectfully moves this Honorable Court for leave to file the accompanying brief as amicus curiae, in support of appellant in the above-entitled cause.

JOHN W. BRICKER,
Attorney General of Ohio,
Counsel for the State of Ohio, as Amicus Curiae.

Of Counsel:

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Special Counsel.

BRIEF OF JOHN W. BRICKER, ATTORNEY GENERAL OF OHIO, AS AMICUS CURIAE.

I.

PRELIMINARY STATEMENT.

This brief is filed on behalf of the state of Ohio because the constitutionality of practically all of the legislation with reference to minimum wages for women and minors in Ohio depends upon legislation almost identical to that which is challenged in this case.

Prior to the enactment of the Ohio Law (House Bill No. 681, enacted by the General Assembly of Ohio in 1933) women and minors were employed in many industries in Ohio at wages dictated by "sweat-shop" conditions and standards. Recognizing the seriousness of the situation, caused by "sweat-shop" conditions, to employes, employers, and the general public, the Legislature attempted to remedy the situation by enacting a Minimum Wage Law for women and minors (Sections 154-45d to and including Section 154-45t, General Code of Ohio), which in substance authorized certain state officials, after public hearings, to fix minimum fair wages for women and minors in any industry where there was a finding that "oppressive and unreasonable wages" were being paid to them. The Ohio Minimum Wage Law provides for a division of minimum wage in the department of industrial relations of the state of Ohio and is similar in its administrative features to the Minimum Wage Law of the state of New York.

The statement of the purpose of the Ohio Law was set forth in Section 18 thereof and reads as follows:

> "This act is hereby declared to be an emergency law, necessary for the immediate preservation of the public health, peace and safety. The reason for such necessity lies in the fact that sweat-shop evils are growing throughout the state of Ohio; that wages, so low as to be detrimental to the health and welfare of thousands of workers in industry, are being paid by many employers; that payment of such low and oppressive wages encourages and promotes 'cut-throat' competition in industry to the detriment of employers and employes alike and to business and industry in general. This act shall therefore go into immediate effect."

After the Ohio Minimum Wage Law was enacted by the Legislature of the state of Ohio, the superintendent of the division of minimum wage was appointed in accordance with the terms of the act.

The Ohio Law does not attempt to regulate wages generally. It does not fix a "living wage" irrespective of the nature of the work done or the value of the services rendered. Only where a substantial number of women and minors in any occupation are receiving "oppressive and unreasonable wages" defined in Section 1 of the act as "a wage which is both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health", may an investigation be made to determine whether the wages are fairly commensurate with the value of the services rendered. If such investigation, by the director of the department of industrial

relations or the superintendent of the division of minimum wage in the department of industrial relations, finds that the wages are not fairly commensurate with the value of the services rendered, a representative wage board, made up of three (3) employers in the industry, three (3) employes in the industry, and three (3) disinterested representatives of the public, acting on convincing proof, may recommend to the director of the department of industrial relations the establishment of minimum fair wage standards for the particular occupation in question. After a public hearing, the director of the department of industrial relations may put into effect such minimum fair wage standards. For a period of at least three (3) months the standards are directory orders only, to be vindicated only by the force of publicity. If after such trial period, the non-observance of the directory orders is so persistent as to threaten the maintenance of the standards established, the director of the department of industrial relations may, after a public hearing, make the observance of the fair minimum wage standards mandatory and their violations subject to the penal law. In addition, the Ohio Minimum Wage Law for women and minors permits differentiation in classes of service, lower minimum standards for learners and apprentices and special licenses for those whose earning power has been impaired. The rights and interests of every group affected are scrupulously dealth with and safeguarded. The Ohio Minimum Wage Law for women and minors does not set up any arbitrary wage standard. In determining a fair wage, a wage fairly and reasonably

commensurate with the value of the services rendered, all relevant circumstances affecting the value of the services rendered may be considered.

These features of the Ohio Law pointed out above are practically identical to the New York Law in question with the exception that the directory orders, before they can be made mandatory, under the New York Law, must be in effect nine (9) months rather than the three (3) months' period required by the Ohio Law.

After investigations, as required by law, the director of the department of industrial relations of the state of Ohio convened a wage board consisting of three (3) representatives of the women employes in the laundry industry, three (3) employers therein, and three (3) disinterested members of the public to make recommendations as to a "fair wage" for women and minors employed in such industry. Later a similar board was convened for the dyeing and cleaning industry. The director of the department of industrial relations, after public hearings, accepted the recommendations of these wage boards and issued directory orders fixing a fair minimum wage for women and minors employed in the laundry and dyeing and cleaning industries. Violation of such directory orders was made punishable under the law by publication of the offender's name in a newspaper. After a probationary period of three months of the directory order, and after a finding by the director of the department of industrial relations that the persistent non-observance of such order was a threat to the maintenance of fair minimum wage standards, and after public hearings,

the directory orders were declared mandatory by the director of the department of industrial relations. A violation of a mandatory order under the law is made a misdemeanor.

The last federal census in Ohio revealed that approximately five hundred and thirty-nine thousand (539,000) women and minors were employed in Ohio industries. The files in the department of industrial relations in the state of Ohio show that there are approximately two thousand (2,000) women and minors employed in the dyeing and cleaning industries in Ohio and approximately fifty-five hundred (5,500) women and minors employed in the laundry industry in Ohio. The validity of the Ohio Minimum Wage Law for women and minors has been challenged as to its constitutionality in the United States District Court for Ohio, Southern District, Eastern Division. The main issue in that case is precisely the same as the issue in the case at bar.

II.

POINT OF LAW INVOLVED.

The issue is, whether a sovereign state, in the exercise of its police power, upon a finding that a substantial number of women and minors are employed in a given industry at "oppressive and unreasonable" wages, has the power, after due investigation and public hearings, to fix minimum wages for such women and minors, based upon the reasonable value of their services, without violating the federal Constitution.

III.

SUMMARY OF ARGUMENT.

POINT 1.

The Fourteenth Amendment to the Constitution of the United States is not intended to interfere with the reasonable exercise of the police power of the state to enact laws for the protection and promotion of the public health, peace, morals, safety and welfare, provided such legislation is reasonable and has a real and substantial relation to the public object sought to be accomplished.

POINT 2.

The due process clause of the Fourteenth Amendment to the Constitution of the United States cannot be construed to destroy the police power of the state, nor can the police power of the state be exercised contrary to the Fourteenth Amendment.

POINT 3.

The right and liberty of contract, including contracts between employer and employe, is not a universal or unlimited right, and it may be regulated whenever necessary for the public good or welfare.

A. There is no such right as absolute liberty of contract.

B. The right and liberty to contract between an employer and his employe may be regulated for the public good or welfare.

POINT 4.

The Legislature determines the necessity of legislation for the promotion of the public welfare and the appropriate measures to remedy existing evils inimical to the public welfare. In determining the validity of such a measure the Court is concerned only with the power of the Legislature to enact the statute and is not concerned with the policy, the wisdom, the expediency, or the fairness of the legislation.

A. Enactment of minimum wage laws for women and minors in sixteen states clearly discloses an existing evil in reference to the wages of such employes.

POINT 5.

There is a presumption that legislation is constitutional until the contrary clearly appears.

POINT 6.

A minimum wage law passed by a state Legislature which permits the fixing of a minimum fair wage for women and minors, such wage being fixed at the reasonable value of the services rendered, in those industries where it is found that oppressive and unreasonable wages are being paid to a substantial number of women and

minors, is an act which relates to and promotes the public health, welfare and safety, and is a reasonable and valid exercise of the police power of a state and violates no provision of the Constitution of the United States.

A. The economic evils confronting the states.

B. Public welfare requires a state to protect the health of women and minors gainfully employed.

C. Oppressive and unfair wages deter women and minors who are receiving public relief from seeking employment.

D. Police power may be exercised to prevent unfair competition.

E. This Court has on many occasions held that the police power of a state can be exercised to encourage fair competition and to prevent unfair competition.

F. Police power may be exercised to prevent imposition, exploitation and fraud.

POINT 7.

The New York Minimum Wage Law, passed in the light of the decision of **Adkins v. Children's Hospital,** 261 U. S., 525, is supported as to constitutionality by the opinion in that case.

IV.

ARGUMENT.

POINT 1.

THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IS NOT INTENDED TO INTERFERE WITH THE REASONABLE EXERCISE OF THE POLICE POWER OF THE STATE TO ENACT LAWS FOR THE PROTECTION AND PROMOTION OF THE PUBLIC HEALTH, PEACE, MORALS, SAFETY AND WELFARE, PROVIDED SUCH LEGISLATION IS REASONABLE AND HAS A REAL AND SUBSTANTIAL RELATION TO THE PUBLIC OBJECT SOUGHT TO BE ACCOMPLISHED.

This Court has on numerous occasions held that the Federal Constitution is not intended to interfere with the police power of a state to enact legislation for the protection and promotion of the public health, safety or welfare, provided such legislation is reasonable and has a real and substantial relation to the public object sought to be accomplished.

Barbier v. Connolly, 113 U. S., 27, 31;
Powell v. Pennsylvania, 127 U. S., 678;
Murphy v. California, 225 U. S., 623;
McLean v. Arkansas, 211 U. S., 539;
Louisville & Nashville Railroad Co. v. Melton, 218 U. S., 36, 52;
Muller v. Oregon, 208 U. S., 412;
New Orleans Gas Light Co. v. Louisiana Light Co., 115 U. S., 650;
Nebbia v. New York, 291 U. S., 502.

POINT 2.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES CANNOT BE CONSTRUED TO DESTROY THE POLICE POWER OF THE STATE, NOR CAN THE POLICE POWER OF THE STATE BE EXERCISED CONTRARY TO THE FOURTEENTH AMENDMENT.

It is also a familiar rule that neither the contract clause nor the due process clause of the Constitution of the United States is superior to the exercise of the police power of the state. **Chicago B. & Q. R. Co. v. McGuire**, 219 U. S., 549; **Atlantic Coast Line R. Company v. Goldsboro**, 232 U. S., 548, 558. This rule is expressed with clarity by Mr. Chief Justice Hughes, at page 439 in the case of **Home Building & Loan Association v. Blaisdell**, 290 U. S., 398:

> "Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other."

The broad power of sovereignty called the police power which may invade the right of contract protected

by the Constitution of the United States, and which invasion has been upheld by the courts of this country many times, is a power that is indefinable and the courts have confessed their inability to form a general definition for that power. By reason of this inability to form a general definition, the courts have constantly dealt with each case separately so that an examination of the cases wherein the exercise of this power has been questioned merely shows the different phases of its application to various subjects. The police power has been exercised in many ways and it generally consists of either regulatory or prohibitory legislation. The various subjects which have received legislative attention because of public interest are too innumerable to mention in this brief.

POINT 3.

THE RIGHT AND LIBERTY OF CONTRACT, INCLUDING CONTRACTS BETWEEN EMPLOYER AND EMPLOYE, IS NOT A UNIVERSAL OR UNLIMITED RIGHT, AND IT MAY BE REGULATED WHENEVER NECESSARY FOR THE PUBLIC GOOD OR WELFARE.

The so-called right or liberty of contract, the protection of which is usually invoked in cases of this type, is not an unlimited or unbridled right or privilege but is a right or privilege which is subordinate to any legislative enactment which has for its object the comfort, the

safety, the convenience, the general prosperity or welfare of society.

Nebbia v. New York, 291 U. S., 502;
Advance-Rumely Thresher Co., Inc., v. Jackson, 287 U. S., 283;
Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co., 284 U. S., 151;
N. Y. & N. E. R. R. Co. v. Bristol, 151 U. S., 556, 567;
McLean v. Arkansas, 211 U. S., 539, 545, 547;
Chicago B. & Q. Co. v. McGuire, 219 U. S., 549, 567;
Legal Tender Cases, 12 Wall., 457, 551.

A. **There Is No Such Right As Absolute Liberty of Contract.**

This Court has held that there is no such thing as the absolute liberty of contract.

Schmidinger v. Chicago, 226 U. S., 578, 579;
Block v. Hirsh, 256 U. S., 135.

B. **The Right and Liberty to Contract Between An Employer and His Employe May Be Regulated For the Public Good or Welfare.**

Holden v. Hardy, 169 U. S., 366;
(Limiting employment in underground mines or workings, and in smelters and other institutions for the reduction or refining of ores or metals, to eight hours a day except in cases of emergency.)
Knoxville Iron Co. v. Harbison, 183 U. S., 13;
(Requiring the redemption in cash of store orders or other evidences of indebtedness issued in payment of wages. See also **Keokee v. Taylor**, 234 U. S., 224.)

Muller v. Oregon, 208 U. S., 412;
(Prohibiting the employment of women in laundries more than ten hours a day.)
McLean v. Arkansas, 211 U. S., 539;
(Making it unlawful to pay minors employed at quantity rates upon the basis of screened coal, instead of the weight of the coal as originally produced in the mine.)
Erie Railroad Co. v. Williams, 233 U. S., 685;
(Providing that railroad employes were to be paid semi-monthly.)
St. Louis Iron Mt. Ry. v. Paul, 173 U. S., 404;
(Providing for the payment on the date of discharge of unpaid wages.)

See also the cases of **Patterson v. The Eudora**, 190 U. S., 169; and **Strathearn Steamship Co. v. Dillon**, 252 U. S., 348.

POINT 4.

THE LEGISLATURE DETERMINES THE NECESSITY OF LEGISLATION FOR THE PROMOTION OF THE PUBLIC WELFARE AND THE APPROPRIATE MEASURES TO REMEDY EXISTING EVILS INIMICAL TO THE PUBLIC WELFARE. IN DETERMINING THE VALIDITY OF SUCH A MEASURE, THE COURT IS CONCERNED ONLY WITH THE POWER OF THE LEGISLATURE TO ENACT THE STATUTE AND IS NOT CONCERNED WITH THE POLICY, THE WISDOM, THE EXPEDIENCY, OR THE FAIRNESS OF THE LEGISLATION.

It is a well established rule that anything which is reasonable and necessary to secure the peace, safety, morals and best interests of the public may be done under the police power and this implies that private rights exist subject to the public welfare. Consequently, the general power of the Legislature to determine what is necessary for the protection of the public interests being well settled, judicial inquiry is limited to the determination of whether the legislative action has a real and substantial relation to an existing public evil and whether or not the particular regulation is reasonable within the limitations of the Constitution. The Legislature is the

judge of mischief and the remedy, and of what should be state policy, subject to the restrictions before mentioned.

McLean v. Arkansas, 211 U. S., 539, 547;
German Alliance Insurance Company v. Lewis, 233 U. S., 389;
Holden v. Hardy, 169 U. S., 366, 392;
Gorieb v. Fox, 274 U. S., 603, 608;
Lawton v. Steele, 152 U. S., 133, 136;
Jacobson v. Massachusetts, 197 U. S., 11, 30;
Muller v. Oregon, 208 U. S., 412;
People, ex rel. Selz v. Hesterberg, 211 U. S., 31;
Radice v. New York, 264 U. S., 292;
Nebbia v. New York, 291 U. S., 502, 537;
Booth v. Illinois, 184 U. S., 425, 429;
Chicago B. & Q. R. Company v. McGuire, 219 U. S., 549, 569.

A. **Enactment of Minimum Wage Laws For Women and Minors in Sixteen States Clearly Discloses An Existing Evil in Reference to the Wages of Such Employes.**

That female and minor employes are receiving oppressive and unfair wages for their services in many of the industrial states where women and minors are employed upon a large scale and that such wages constitute an existing public evil of great magnitude, is evidenced by legislative action of sixteen states[1] enacting laws similar to the law under attack in this case.

[1] Laws of New York, ch. 584, art. 19, passed April 29, 1933. California—(Hennings General Laws, edition 3 (Hyatt), 1920, Act 2107; session laws, 1929, ch. 256); Colorado—(Compiled laws, 1921 (published 1922), secs. 4262-4283, 4329); Connecticut—(Cumulative Supplement to the general statutes: 1931, 1933, ch. 131a, secs. 620b-633b); Illinois—(Session laws 1933, p. 597-604); Massachusetts—(Session laws 1933, ch. 308; 1935, ch. 267); Minnesota—(General Statutes, 1927, secs. 4033-4034, 4210-4232); New Hampshire—(Session laws 1933, ch. 87); New Jersey—(Session laws,

Such a universal recognition of an existing evil demonstrates that there is a real and not a fanciful factual basis for such legislation. Legislative recognition of an existing evil is a factor of great weight in determining the need of the exercise of the police power. This Court in the case of **German Alliance Insurance Company v. Lewis**, 233 U. S., 389, expressly recognized such a factor in the sixth paragraph of the headnotes which states:

> "A general conception of the law-making bodies of the country that a business requires governmental regulation is not accidental and cannot exist without cause."

See, also, **Whitfield v. State of Ohio**, decided by this Court on March 2, 1936.

1933, ch. 152); New York—(Session laws 1933, ch. 584); North Dakota—(Supplement to compiled laws, 1913-1925, secs. 396b3, 396b6-396b9, 396b11-396b16; session laws 1935); Ohio—(Session laws 1933, pp. 502-510); Oregon—(Session laws 1931, ch. 395; code, 1930, vol. 3, title 49, secs. 303-319); South Dakota—(Compiled laws 1929, sec. 1022-A-1022-E; session laws 1931, chs. 173, 174); Utah—(Session laws 1933, ch. 38); Washington—(Pierce's Code, 1929, secs. 4-3, 4-74, 4-75, 4-77, 4-82; 3526-3547); Wisconsin—(Statutes, 1931, secs. 20-57, 101.02, 104.01-104.12).

[1a] Minimum wage laws have been enacted in the following countries: Porto Rico, Great Britain, Canadian Provinces of Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, Quebec, Saskatchewan, Germany, Mexico, Union of South Africa, Czechoslovakia, Hungary, Uruguay, Spain, Italy, Chili, Ecuador, Costa Rica, Nicaragua, Cuba, Peru, Australia, New Zealand, Argentina, France and Norway.

POINT 5.

THERE IS A PRESUMPTION THAT LEGISLATION IS CONSTITUTIONAL UNTIL THE CONTRARY CLEARLY APPEARS.

The principle of presumption of constitutionality of a legislative act, and that all doubt must be resolved in support thereof is so well established that extended citation of decisions of this Court in support thereof is unnecessary. **California Reduction Company v. Sanitary Reduction Works**, 199 U. S., 306, 319; **Sinking Fund Cases**, 99 U. S., 700, 718. This presumption applies not only to the law itself but to the existence of the factual conditions which induced the legislative action.

Borden's Farm Products Company, Inc., v. Baldwin, 293 U. S., 194;

O'Gorman and Young v. Hartford Fire Insurance Company, 282 U. S., 251, 252.

POINT 6.

A MINIMUM WAGE LAW PASSED BY A STATE LEGISLATURE WHICH PERMITS THE FIXING OF A MINIMUM FAIR WAGE FOR WOMEN AND MINORS, SUCH WAGE BEING FIXED AT THE REASONABLE VALUE OF THE SERVICES RENDERED, IN THOSE INDUSTRIES WHERE IT IS FOUND THAT OPPRESSIVE AND UNREASONABLE WAGES ARE BEING PAID TO A SUBSTANTIAL NUMBER OF WOMEN AND MINORS, IS AN ACT WHICH RELATES TO AND PROMOTES THE PUBLIC HEALTH, WELFARE AND SAFETY, AND IS A REASONABLE AND VALID EXERCISE OF THE POLICE POWER OF A STATE AND VIOLATES NO PROVISION OF THE CONSTITUTION OF THE UNITED STATES.

It is "the duty of the court to inquire into the real effect of any statute". **Fairmont v. Minnesota**, 274 U. S., 1. The real effect of the New York Law under consideration and similar laws is quite clear. By requiring a minimum wage fixed according to value received to be paid women and minors employed in occupations wherein oppressive and unreasonably low wages are paid, such a law provides a fair return to an unorganized class of employes who are at the mercy of employers operating sweat-shops or who are unscrupulous in their dealings with their employes. The effect of this law is to obtain for women and minors a fair but not necessarily a subsistence or living wage.

A. **The Economic Evils Confronting the States.**

It is an economic principle that the existing economic dilemma results from the fact that we do not have purchasing power and that the economic cycle tends to become a vicious circle wherein the purchasing power of the mass of the people becomes progressively less. When that occurs, the public treasury must supplement the income of its citizenry. To break this vicious economic circle and to relieve the public from supporting those employes who because of their youth or sex and inability to bargain on a basis of equality and fairness with the purchaser of their labor, the legislators of Ohio and other states have concluded that the problem can be remedied only by providing for minimum wages for such employes. In so doing, the purchasing power of the general public is increased and the public treasury relieved of a burden that usually occurs when employes are denied work or are employed at wages that are not commensurate with the value of the service rendered. The New York Law proposes to fix a minimum wage for each particular occupation and employment in which a substantial number of women and minors are employed at oppressive and unfair wages. Is such an act forbidden under the Fourteenth Amendment to the Constitution of the United States? It is submitted that the answer is "No", especially when it is borne in mind that the minimum wage that is fixed is based on the minimum value of the service or labor rendered by the employe to her employer and is not based on what her actual needs might be in

order to secure a "living wage". It must be conceded that an employer under such a law cannot fix a wage that he might deem adequate for his employe, which wage might and does vary according to his standard of wages and ideas of competition. Under the law the employe and employer can contract for any wage that they might agree upon, except that it cannot be less than that fixed by law after investigation and hearing for a particular employment or occupation. In other words, the Legislature has attempted to fix a rule of conduct to which all employers of women and minors in a particular industry must adhere in the conduct of their business. This rule of conduct which takes the form of a minimum wage is not a capricious or arbitrary one but is one which is fixed by the administrators only after investigating, hearing and evaluating the worth of the particular service performed by the employe to the employer.

Since the beginning of the twentieth century a vast change has occurred in our social, economic and industrial life. Prior to the mechanization of industry and the growth of large urban centers, women were generally confined to the home in the capacity of superviser and converter of the raw materials raised or procured by the head of the family. Today women, married and single,

in order to supplement the income of the family or to support themselves, are forced to leave the confines of the home in order to become providers.[1] In 1890 less than fifty thousand married women were gainfully employed in Ohio and according to latest statistics there are slightly over one hundred and fifty thousand married women gainfully employed today in Ohio.[1] There has been a consistent increase in the number of women employed in industry in Ohio ranging from 246,071 in 1900 to 539,606 in 1930.[2] This increase in the employment of women in Ohio can be accounted for only because of the mechanization of industry with its resultant demand for cheap, unskilled or semi-skilled and yet dexterous operators. Women and minors have always been employed in preference to men whenever they could produce the same or better results at a less wage.[3] The labor of women and minors has always been regarded from time immemorial as cheap labor and the fact that women and minors are preferred in employment in the so-called non-

[1] The percentage of gainfully employed women in Ohio in various age groups in 1900 and in 1930 is as follows:

	1900	1930
10 to 24 years	19.8	22.2
25 to 44 years	14.5	23.3
45 years and over	9.2	13.8

See Appendix A.

[2] Fifteenth Census of the United States, 1930, Population Vol. IV, Occupations by States, Table I, page 1237.

[3] United States Department of Labor, Women's Bureau, **Variations in Wage Rates under Corresponding Conditions,** Bulletin No. 122, 1935. See Appendix B.

New York State Department of Labor, Bureau of Women's Industry, **The Industrial Replacement of Men by Women in the State of New York,** Special Bulletin No. 93, pages 27-29, 33. The United States Department of Labor, Women's Bureau, The Effects of Labor Legislation on the Employment Opportunities of Women, Bulletin No. 65, 1928, page 228.

durable goods industries over men and are paid lower wages, than men for similar work, is conclusive evidence that women and minors receive wages that are not commensurate with the value of the services rendered and that such employes being unorganized are not in a position to bargain equitably and fairly for their services.

In Ohio in 1926, on a study of the wage rates of men and women based on data gathered by the division of labor statistics of Ohio, it was found that women wage earners were paid at median rates[1] 52.76 percent of such rates for men; women clerical workers at 58.7 percent of the median rates for men; saleswomen at 47.02 percent of the median rate of salesmen and all women workers covered by the report of the division at a median rate of 56.10 percent of the median rate for men.[2] Similar differences in rates of wages paid women and men for similar work was found in the textile, clothing (men and women), hosiery and knit goods and rubber industry in Ohio.[3].

The division of minimum wage in the department of industrial relations, state of Ohio, found that in May, 1933, over 29 percent of the women covered by a survey of the laundry industry received less than six dollars a

[1] Median rate is midpoint in a series of items arranged in order of magnitude, half the items being above and half below this point.

[2] Information Bureau on Women's Work. **Wages, Rates, Earnings and Fluctuations of Employment in Ohio,** 1914-1926, pages 64, 69, 70.

[3] Information Bureau of Women's Work **Ohio Wage Earners in the Manufacture of Textiles and Textile Products** 1914-1927, pages 22, 42, 56, 66.

Information of Women's Work **Ohio Wage Earners in the Manufacture of Rubber Products,** 1914-1928, pages 21, 42.

week[1] and a survey and investigation of the dry cleaning industry also made by the division revealed that over 16 percent of the women employed therein received less than seven dollars per week in May, 1933.[2] The reports of the division of labor statistics of the state of Ohio show that a large proportion of gainfully employed women in Ohio in good and bad times in all industries is paid at rates of less than ten dollars per week. In 1932 over forty thousand women or one-fourth of all the wage-earning women in Ohio were paid wage rates of less than ten dollars a week. This number fell to 17,485 in 1934, but in 1929, a year of so-called relatively high wages, 18,320 or 8.4 percent of the women gainfully employed in Ohio were paid ten dollars or less. In 1929, 18.5 percent of the women were paid weekly rates of wages of less than twelve dollars. 43.7 percent received less than twelve dollars in 1932 and 19 percent were in this wage group in 1934.[3].

The ease with which women and minors can operate the mechanical devices now used in the industrial world, to produce goods and the fact that they can be employed at rates fifty to sixty percent less than those paid to men employes, has resulted considerably in the replacement of men in industry by women and minors. This result has contributed in some degree to the unemploy-

[1] Ohio Department of Industrial Relations, Division of Minimum Wage, report to the Laundry Wage Board relating to wages and hours of women and minors in the laundry industry in Ohio, January, 1934.

[2] The Ohio Department of Industrial Relations, Division of Minimum Wage, reports to the dyeing and cleaning wage Board relating to wages and hours of women and minors in the dyeing and cleaning industry in the State of Ohio, May 1934.

[3] Department of Industrial Relations, Division of Labor Statistics, Report No. 26, Rates of Wages, Fluctuations of Employment, Wage and Salary Payments in Ohio, 1929, and unpublished wage data compiled by the Division of Labor Statistics for 1932 and 1934.

ment problem confronting the nation, particularly in the industrial states like Ohio and New York. This Court can take judicial notice of the fact that the unemployment of men and likewise the difficulty of securing employment for them in industries in which women and minors have replaced them, has caused a drain upon the public treasuries of the nation, states and municipalities in the form of relief. This replacement problem and the unemployment of men that follows in its wake can be directly traced to the fact that women and minors who are not the chief providers of a family can be employed at rates less than those required to be paid to men. The fact that women and minors are generally not the principal providers of a family tends to make it possible for them to work at rates of wages which men and unmarried women performing the same kind of work cannot accept.

Employers in various industries have taken advantage of this economic and social condition to fix wages for women and minors which are arbitrary and not commensurate with the value of the services rendered to the employer. This fact has contributed greatly to the unemployment of men, which in turn has, as previously pointed out, caused a drain on the public treasuries to support the heads of families who have been replaced.

Although the making of private contracts is, as a general rule, free from governmental interference, it is subject to public regulation when the **public need** requires. **Nebbia v. New York**, 291 U. S., 502. It is submitted that in this case clearly and demonstrably the **public need** requires that contracts between women and minor employes and employers in industries where such employes are receiving "oppresive and unreasonable wages" (wages less than necessary to maintain

a minimum standard for health and wages less than the fair value of the services rendered) requires public regulation.

What is the great public need in the instant case?

Women and minor employes in certain industries are receiving wages less than the value of their services and less than sufficient for a minimum health standard. The state must necessarily be interested in their health and well-being.

Not only are such employes suffering in the laundry industry but the employers in the laundry industry are suffering because the ruthless competition in that industry is based primarily on "wage costs". Because of the lack of a fair wage standard for women and minor employes in the laundry industry, unscrupulous employers in this industry are constantly lowering wages, producing unfair competition against other employes in reducing such employes' purchasing power.

The payment of sweat-shop wages in many industries encourages and promotes "cut-throat" competition of an unwarranted and uneconomic kind and is detrimental not only to the employes but also to the employers therein and the public at large. The lowest standards of wages tend to become the highest standards and the overreaching employer competing directly with more scrupulous employers forces the latter to the same low wage level.

Men who cannot compete as well as thousands of women and children are forced onto the public relief rolls because of oppressive wages in many industries, thus pyramiding the constantly increasing burden of taxation.

Women and children on public relief rolls at the present time refuse to enter employment in an industry where the wages paid are oppressive and unreasonable, as it is against their own economic interest and is contrary to the rule of self-preservation if such wages in industry are less than what they receive on relief.

The public welfare depends upon the prevention of exploitation of women and minors in occupations of this type.

Public need and public policy are necessarily against having a particular industry conducted on a basis that will prove ruinous both to employes and employers in the particular industry, as well as to the general public.

This widespread and economic evil which has spread throughout the great industrial states, working to the material detriment not only of their people who are dependent upon a daily wage to exist, but to all citizens and the state itself on account of the ever increasing cost of relief with its mounting taxation demands, not only justified, but impelled the states to meet the situation with proper regulatory measures. Can it be said that the sovereign states are powerless to cope with such a situation which uncontrolled may well lead to their very destruction? A mere statement of the question impels the answer.

It is submitted that if the sovereign states under their reserved police powers are helpless to cope with this condition for the protection of their people in the face of economic development and mechanization, then the police power is a feeble thing which must fail when its exercise is most needed.

B. **Public Welfare Requires a State to Protect the Health of Women and Minors Gainfully Employed.**

The health and protection of women and minors in industry has always been deemed a matter of public concern in this country and statutes regulating or restraining the freedom of contract of women and minors in furtherance of that purpose have been upheld many times. **Bradwell v. Illinois**, 16 Wall., 130; **Muller v. Oregon**, supra; **Radice v. New York**, 264 U. S., 292; **Sturges and Burn Manufacturing Company v. Beauchamp**, 231 U. S., 320; **Miller v. Wilson**, 236 U. S., 373; and **Bosley v. McLaughlin**, 236 U. S., 385. The well-being of future generations requires that the health of women and minors be safeguarded from any environment which may affect their well-being and especially the well-being of their offspring. The physical welfare of the woman worker is a matter of great public concern to the commonwealth. It must be conceded that the problem of the health of women is to a large extent a problem of the race, as weakly constituted women cannot be mothers of healthy children and unfair and oppressive wages dictated by sweat-shop employers and conditions do not make it possible for women and minor workers to secure or maintain even a fair standard of physical well-being. The barest necessities of life cannot be obtained by women and minor workers who are employed at oppressive and unfair wages. **Investigation in Ohio of the laundry and dyeing and dry cleaning in-**

dustries reveals that the women and minors employed therein are receiving wages that are less than the amounts granted to the unemployed by public relief agencies.

The Legislatures of New York, Ohio and other states have found that unfair and oppressive wages paid to women and minors gainfully employed is a matter affecting the public health, safety, prosperity and welfare. Public welfare requires that such employes should not be taken advantage of by unscrupulous employers. The maintenance of a minimum wage in an industry where women and minors are employed at oppressive and unreasonable wages is imperative for the preservation of the public health, for the elimination of unfair cut-throat competition and for the maintenance and furtherance of fair competition.

C. **Oppressive and Unfair Wages Deter Women and Minors Who Are Receiving Public Relief from Seeking Employment.**

As previously pointed out, many industries today are paying wages to women and minors gainfully employed therein that are less than the amount granted by public relief agencies. Those persons who, if paid a minimum fair wage, would be eager to work in private industry, refuse to seek such employment for the reason that it would be to their economic and financial disadvantage to accept a wage which is less than the public grants as relief or charity. This fact tends to increase the public

debt and does not tend to reduce unemployment. If industry paid a wage commensurate with the services rendered, it necessarily would stand to reason that a recipient of public aid would more than welcome the opportunity to earn her own way than to be a ward of the public charity.

D. Police Power May Be Exercised to Prevent Unfair Competition.

It must be borne in mind that ruthless, unfair and cut-throat competition can occur only at the expense of labor, especially labor that is unorganized and in no position to bargain for a fair rate for the services to be rendered. Fair competition can be maintained only by requiring minimum wages to be paid to certain classes of employes gainfully employed in industries wherein oppressive and unreasonable wages are paid. Without minimum fair wages in those industries where a substantial number of women and minors are employed at wages less than the reasonable worth of their labor, chaos will eventually result.

It must be perfectly obvious that the problem of the individual worker in bargaining for a wage, changes substantially as the conditions of industry become more complex. In a frontier or agricultural or pre-industrial community, it may be a relatively simple thing for the wage bargain to be effected with little probability of over-reaching on either side. But when the highly organized industrial life is encountered, the situation

changes profoundly. And this change does not arise entirely from the centralization of **power** on the side of the employer, (although this is frequently referred to), but it comes also from a change in the **sources of information** which are available.

It is perfectly true that the enormous centralization of power in the hands of corporate employers may be conceived of as placing individual employes at a great disadvantage in their approach to an equitable wage bargain. But it is equally true, that this disadvantage is greatly magnified and rendered vastly more troublesome, by the almost complete lack of knowledge in the employes as to the actual worth of their services. This distinction seems to us to be a very real and very important one. It is quite true that with reference to some well organized and disciplined trade unions, this differential —both in sheer financial strength, and in available information as to the real worth of their services—is somewhat balanced through collective strength and collective bargaining. But it is equally true that among other groups, there is an almost total lack with reference to both phases of this problem.

Dealing, for the moment, with the lack of available information as to the real worth of their services, how can women and children in industry be expected to proceed to know the real value of their services? In our industrial centers, where industry dominates the whole community life, there is an immense problem of making available to those groups of employes who otherwise will

have little if any ability to know what their services are worth, the real facts of the situation.

No one, we submit, has the constitutional right to secure wage contracts with his employes at a price less than the services are worth, when that situation is brought about by reason of their helpless ignorance in bargaining for the wage contract.

It follows therefore, that a state such as New York or Ohio which is faced with this industrial problem, is warranted in believing that by setting up the machinery for determining the reasonable value of the services of some groups of women and children in industry, it is taking a practical means to prevent the unconscionable cheating of those who would otherwise be helplessly ignorant, and unable to protect themselves.

These results affect not only the employe and employer, but the general public as well. Is there anything in the Constitution which would require this Court to thwart the purpose of minimum wage laws in order to protect certain minority employers in underpaying their employes and underselling their competitors, to the detriment of other employers, employes and to their own ultimate destruction? This Court in the past has answered that question in the negative.

The recent decision of this Court in its present term of **Whitfield v. Ohio**, decided on March 2, 1936, is apposite. Here this Court recognized and upheld legislation enacted for the purpose of protecting industry and labor from the ruinous competition of prison-made goods, an evil which, like that in the case at bar, many states

had sought to remedy. In principle the two cases are directly analogous in that there the unrestricted sale of prison-made goods on the open market resulted in unfair competition with free labor and industry, and here the unregulated evils of sweat-shop wages paid to women and children has resulted in unfair competition with the majority who must earn a living wage. In the **Whitfield** case this Court recognized that the states have power to legislate against unfair competition and to protect their labor and industries.

Thus, it was held that a Legislature could fix prices in a business which was clothed with a public interest. **(Munn v. Illinois**, 94 U. S., 113); and fix insurance rates **(German Alliance Insurance Company v. Lewis**, supra); and fix the price of milk in an industry which affected the public welfare **(Nebbia v. New York**, supra). It is submitted that there is no substantial distinction between the fixing of prices to be paid for the storing of grain, insurance or milk, and the fixing of minimum wages for women and minors gainfully employed in industries where oppressive, unfair and unreasonable wages are being paid. This Court has said on many occasions that if the end to be accomplished relates to the public welfare, the means used to accomplish such result if not arbitrary or unreasonable, will be sustained. If that is true, then it necessarily must follow that the means used in minimum wage laws should be sustained even if the same takes the form of wage-fixing.

The extent to which a Legislature may use price-fixing as a means to an end is clearly set forth by Mr. Justice

Roberts, in the case of **Nebbia v. New York**, supra, at page 537, wherein he said:

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the Legislature, to override it. If the laws passed are seen to have a reasonable relaiton to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court **functus officio.**"

It may be argued that, in a sense, the fixing of minimum wages for women and minors in industries where there is a finding that "oppresive and unreasonable" wages are being paid to such employes, is a "price-fixing" statute. However, this court has said in the case of **Nebbia v. New York**, supra, that an industry need not be a "public utility" before it may be subjected to price-fixing regulations. The case is also authority for the proposition that there is no magic in the labeling terms "affected with a public interest". In other words, as it is stated in the eleventh paragraph of the headnotes of the **Nebbia** case:

> "Decisions denying the power to control prices in businesses found not to be 'affected with a public interest' or 'clothed with a public use' must rest finally upon the basis that the requirements of due process were not met **because the laws were found arbitrary in their operation and effect.**" (Boldface ours.)

E. **This Court Has on Many Occasions Held That the Police Power of a State Can Be Exercised to Encourage Fair Competition and to Prevent Unfair Competition.**

Price-fixing which tends to preserve and promote fair competition, rather than to undermine it, was upheld by this Court in the **Nebbia** case and in the case of **Appalachian Coals, Inc., v. United States,** 288 U. S., 344, 360. That is, the exercise of the police power to encourage fair competition and to prevent unfair competition may take the form of "price-fixing". Although American business is traditionally competitive, the "price-fixing" of minimum wages for women and minors in an industry where oppressive and unreasonable wages are being paid to such employes, tends to preserve and promote the competitive system. Where competitive labor costs reach too low a level, as in industries where oppressive and unreasonable wages are being paid women and minors, efficient employers are unwilling to compete further on such a basis and the fixing of a fair minimum wage standard becomes necessary in order to maintain competition. The standard fixing "quantum meruit", or the reasonable value of the services rendered, is evolved from within the industry itself. The minimum wage law in question is not a general wage-fixing statute, but applies only to women and minors who are the lowest paid and exploited group, because unorganized. The fair wage fixed is the reasonable value of the services in relation to actual wages paid by efficient em-

ployers in the particular industry where a substantial number of women and minors are receiving wages less than sufficient to meet a minimum standard of health and less than the reasonable value of their services.

Likewise, the legislative determination to attempt by means of a minimum wage to protect industry from one source of unfair competition has a large and similar foundation in such statutes as the Federal Trade Commission Act, the Clayton Act and Interstate Commerce Act. These statutes all have as their purpose the elimination of unfair competitive practices. An employer who regularly pays less than a fair wage would have a definite and unfair advantage over his less grasping competitor were it not for the equalizing effect of such a statute. See **Central Lumber Company v. South Dakota,** 226 U. S., 157. Moreover, the standard fixed by the unscrupulous competitor generally becomes the standard for the entire industry, all to the detriment of the general public and the employes and employers engaged in said industry.

The case of **Nebbia v. New York**, supra, is another example of judicial approval of a law designed to prevent unfair competition and thus assist and indeed save industry even from its own irrational and illogical acts.

F. **Police Power May Be Exercised to Prevent Imposition, Exploitation and Fraud.**

It is a familiar rule of law that the police power of a state may be exercised to prevent the imposition, exploitation or the practice of fraud upon its citizens.

Hall v. Geiger-Jones Company, 242 U. S., 539.

Statutes regulating the size and weight of loaves of bread to prevent imposition, deception and fraud have been sustained by this Court (**Schmidinger v. Chicago**, 226 U. S., 578; **Peterson Baking Company v. Bryan**, 290 U. S., 570).

To prevent fraud and deception in the sale of securities, a law regulating and licensing the persons engaged therein was sustained in Hall v. Geiger-Jones Company, supra; and to prevent fraud and deception as to the ingredients of food.

Hutchinson Ice Cream Company v. Iowa, 242 U. S., 153.

Mr. Justice McKenna, in the case of Hall v. Geiger-Jones Company, supra, at page 552, said, in commenting about the case of **Hutchinson Ice Cream Company v. Iowa**, supra:

> "We have very lately decided a case upon the principle of the power of the state to prevent frauds and impositions."

Minimum wage laws tend to prevent imposition on a class of employes who are not in a position to bargain

fairly and equitably for a rate of wages commensurate with the services rendered. An employer who for various reasons pays an oppressive and unreasonable wage is guilty of defrauding and deceiving his female and minor employes who are compelled because of economic and social conditions to accept a rate of wages which is unfair and not what their labor is reasonably worth to the employer. It does not require statistics to support the statement that women and minors gainfully employed are compelled to accept rates of wages for their services that are fixed according to the standards of the employer and on a basis other than **quantum meruit.**

It has always been the policy of the Legislature to enact laws to prevent contracts that are unfair and coercive in their terms, especially when one of the parties to the contract is in a position of helplessness. Good examples of such laws are the usury statutes which are intended primarily for the prevention of contracts which are coercive and unfair. **Griffiths v. Connecticut,** 218 U. S., 563. If it is sound public policy and morality to restrain the bargaining power of one of the parties to a contract who is more powerful or in a better position to bargain than the other contracting party, then the enactment of a similar rule of public policy in the form of a minimum wage law should be sustained, especially when the legislative restriction is aimed at contracts which are likely to prove ruinous not only to the employe but also to other employers and employes engaged in the same industry as well as to the public at large. Legislation such as involved in **Griffiths v. Connecticut,**

supra, has been sustained on the principle that it is better public policy not to have loans made on a basis that is likely to prove ruinous to the borrower, so it is believed that it is better public policy not to have industry conducted on a basis that is likely to prove ruinous and detrimental to the employes engaged therein at wages both oppressive and unreasonable. If the Legislature can enact laws to prevent imposition on the public in respect to the purchase of foodstuffs and securities, it would therefore follow that a similar authority would exist by means of a reasonable minimum wage law to prevent employers from imposing upon their female and minor employes, who are taken advantage of because of the nature of their employment, their inability to organize, and their willingness to work at any wage to supplement the incomes of their families.

POINT 7.

THE NEW YORK MINIMUM WAGE LAW, PASSED IN THE LIGHT OF THE DECISION OF ADKINS v. CHILDREN'S HOSPITAL, 261 U. S., 525, IS SUPPORTED AS TO CONSTITUTIONALITY BY THE OPINION IN THAT CASE.

The Ohio Minimum Wage Law for women and minors and the New York Law in question, and similar laws in other states, are the result of conscientious effort by the various legislatures to meet the objections which a majority of the Supreme Court in 1923 found against the act of Congress regulating the wages of female and minor

employes in the case of **Adkins v. Children's Hospital**, 261 U. S., 525. With respect to the Adkins case it must be stated at the outset that the objections of the majority of the Court as represented by the majority opinion written by Mr. Justice Sutherland, was not to the **purpose** of the legislation in question, but to its **method**. Moreover, it is axiomatic that constitutional law decisions, presented by specific records involving precisely drawn issues, decide only the specific case and the issues presented to the court for its determination. The court does not decide general issues or pass upon all legislation of like character or purpose, or enacted to meet similar conditions, when only one type of legislation is present in the case before it. The issue presented and decided in the Adkins case was that a minimum wage statute enacted for the District of Columbia fixing an alleged fair minimum wage on a basis sufficient "to supply the necessary cost of living to women workers and to maintain them in health and to protect their morals", regardless of whether or not the services rendered to the employers were worth that sum, was unconstitutional as violative of the Fifth Amendment of the Federal Constitution. (A similar Arizona statute fixing a minimum wage on the same theory or basis was declared unconstitutional in an affirmance of a decision of the District Court of the United States for the District of Arizona in the case of **Murphy, Attorney General of Arizona, v. A. Sardell**, 269 U. S., 530, upon the authority of the Adkins case.) On the other hand, with respect to the fixing of a minimum fair wage on a totally different basis, the basis on which the mini-

mum fair wage is set in New York and Ohio and other states, namely, "wages fairly and reasonably commensurate with the value of the service or class of service rendered," it was said in the majority opinion in the Adkins case at page 569:

> "A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, **to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the services,** would be understandable." (Boldface ours.)

The New York and Ohio Laws require that the amount to be paid and the services to be rendered shall bear to each other some relation of just equivalence, and hence being fair minimum wage statutes properly drawn containing all the provisions whose absence was condemned by the majority of the court in the Adkins case, clearly do not run counter to that decision.

The law enacted for the District of Columbia (40 Stat. L., 960 c. 174) provided for the fixing of minimum wages for women in **any occupation** in the District of Columbia through the medium of an administrative board. The board's function was to investigate conditions and wages of such employes and to set a minimum wage on a basis adequate **"to supply the necessary cost of living to women workers and to maintain them in health and to protect their morals."** The board also was empowered to set up standards of minimum wages for minors. Violation of the act was made a misdemeanor punishable by fine or imprisonment.

The principal infirmities of the District of Columbia

law, as voiced in the majority opinion should be summarized for the sake of clarity as applied to the case at bar:

1. The wage fixed by the board under the District of Columbia Law did not need to have any relation to the capacity or earning power of the employe. Stated affirmatively, an employer might be forced to pay more than the reasonable value of the services rendered by the employe.

In the case at bar, the minimum fair wage to be fixed "shall mean a wage fairly and reasonably commensurate with the value of the service or class of service rendered." Article 19, Section 551, Subdivision 2, of the Labor Laws of New York; Section 154-45d, General Code of Ohio. The statutes also permit lower rates for learners, apprentices and incapacitated workers. Article 19, Section 558, Subdivision 2, of the Labor Laws of New York, and Section 154-45k, General Code of Ohio.

2. (a) The wage fixed by the board did not need to have any relation to the number of hours which might happen to constitute the day's work; (b) the wage fixed by the board did not need to have any relation to the character of the place where the work was to be done; (c) the wage fixed by the board did not need to have any relation to the ability of the business to sustain the burden. In other words, it had no other basis than the necessities of the employe and took no account of the other party to the employment contract.

2. (a) **The New York statute challenged herein and the Ohio law do have a relation to the number of hours**

which happen to constitute a day's work. The "quantum meruit" or reasonable value of the services rendered fixes a wage for the reasonable value of an hourly wage for the working day. Moreover "all relevent circumstances affecting the value of the service or class of service rendered" are taken into account in fixing a fair wage. Article 19, Section 551, Subdivision 2, of the New York Labor Laws; Section 154-45d, General Code of Ohio.

(b) **The statutes are not general wage-fixing statutes but apply only to industries where a substantial number of women and minors are employed at wages both less than the value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health.** If such a wage is fixed for a certain occupation at the reasonable value of the services rendered, it necessarily follows that it takes into account both the character of the place where the work is done as well as the kind of service rendered.

(c) **The laws take into account the ability of the business to sustain the burden.** This is true because the wage being fixed "fairly and reasonably commensurate with the value of the service or class of service rendered", gives the employer a **quid pro quo**, and as to the only possible exception, an employer who is unable to pay his employes the reasonable value of their services rendered, such an employer is undoubtedly and unwarrantedly cheating the oppressed employe, and to the extent that the wage paid by him is less than sufficient to meet the minimum for a standard of health for the employe, such

employer is putting the burden upon the public to pay the difference and is thus placing upon the public the burden of paying the legitimate costs of his business.

Inasmuch as the fair minimum wage set is a wage "fairly and reasonably commensurate with the value or class of service rendered" and in establishing such wage the wage setting authority takes into account (1) "all relevant circumstances affecting the value of the services or class of services rendered", and (2) are guided "by like circumstances as would guide a court in a suit for the reasonable value of services rendered where services are rendered at the request of an employer without contract as to the amount of the wage to be paid" and are guided by considering (3) "the wages paid in the state for work of like or comparable character by employers who voluntarily maintain fair minimum wage standards" (Article 19, Section 551, Subdivision 2, of the Labor Laws of New York; Section 154-45d, General Code of Ohio), it is self-evident that such laws necessarily take into account both parties to the employment contract, rather than the employe alone.

3. This Court in the **Adkins** case distinguished the hours of labor decisions from the minimum wage case involved in the District of Columbia case in that the hours of labor statutes were limited to certain occupations, whereas the District of Columbia statute applied to all occupations.

The New York and Ohio statutes and similar minimum wage laws differ from the law held unconstitutional in the Adkins case in that they do not apply to all occupa-

tions, but only to those where investigation discloses the evil of "oppressive and unreasonable" wages present with respect to a substantial number of women and minor employes. Article 19, Sections 551 and 554, Subdivision 2 of the New York Labor Laws; Sections 154-45d and 154-45g, General Code of Ohio.

4. The standard, minimum wages adequate "to supply the necessary cost of living to women workers and to maintain them in health and protect their morals", was too uncertain as the necessary cost of living is not "a precise or unvarying sum."

The standard fixed by the New York and Ohio Minimum Wage statutes for women and minors is not an uncertain one as was present in the District of Columbia statute passed on in the Adkins case. The minimum fair wage means "a wage fairly commensurate with the service or class of services rendered" and "all relevant circumstances affecting the value of the service or class of service are taken into consideration." Article 19, Section 551, Subdivision 2, New York Labor Laws, and Section 154-45d, General Code of Ohio.

Such standard set by the Legislature is capable of reasonably definite application. Such a standard accords with the principles of our Anglo-American law of applying the standard of **reasonableness.** It is the practice that has governed the determination of rates for common carriers and of suits upon a quantum meruit for centuries. Certainly such standard, although not mathematically or mechanically perfect, is capable of **reasonably** definite and accurate application. Moreover, the

New York and Ohio laws permit differentiation in classes of services, lower minimum standards for learners and apprentices and special licenses for all those whose earning power has been impaired.

Having pointed out the chief objections to the District of Columbia statute ruled unconstitutional in the Adkins case and the complete absence of such infirmities in the New York and Ohio laws and similar laws of other states, the following language in the majority opinion in the Adkins case at pages 557, 558 and 559, serves to conclusively show that the **purpose** of minimum wage legislation was not condemned by this Court, the only condemnation having been the **method** of setting such a wage which existed in the legislation enacted by Congress for the District of Columbia, and it further serves to show that the statute challenged in the instant case is well within the police power of the state:

> "The law takes into account the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only where the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving, of course, the privilege of abandoning his business as an alternative for going on at a loss. * * * It compels him to pay at least the sum fixed in any event, because the employee needs it but requires no service of equivalent value from the employee. It therefore undertakes to solve but one-half of the problem. The other half is the establishment of the corresponding standard of efficiency, and this forms no part of the policy of the legislation. * * *"
>
> "The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity

is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do. The declared basis, as already pointed out, is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals. * * *

The moral requirement implicit in every contract of employment, viz., that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. The necessities of the employee are alone considered, and these arise outside of the employment, are the same when there is no employment, and as great in one occupation as in another. Certainly the employer by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. On the contrary, to the extent of what he pays he has relieved it. In principle, there can be no difference between the case of selling labor and the case of selling goods. If one goes to the butcher, the baker or grocer to buy food, he is morally entitled to obtain the worth of his money but he is not entitled to more. If what he gets is worth what he pays he is not justified in demanding more simply because he needs more; and the shopkeeper, having dealt fairly and honestly in that transaction, is not concerned in any peculiar sense with the question of his customer's necessities. * * *

'A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to

any of these things and solely with relation to circumstances apart from the contract of employment, the business affected by it and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States.'"

It is perfectly obvious that the foregoing language of this Court in the **Adkins case** supports rather than defeats the constitutionality of the New York Law herein challenged. This case is under no circumstances parallel with the case at bar and is no authority in support of the unconstitutionality of the New York Law. The New York Law, like the Ohio Law, was enacted in the light of the **Adkins** case and drawn to carry out the valid exercise of the police power expressly recognized in the majority opinion.

CONCLUSION.

It is submitted that the New York Minimum Wage Law provides for the establishment, after due investigation and public hearings, of minimum wages for women and minors in any particular industry in which, after such investigation and hearings, it is found that a substantial number of women and minors are receiving "oppressive and unreasonable" wages, which minimum wages so fixed are based upon the reasonable value of the service to the employer. Such a law enacted by many sovereign states for the protection of the public health and welfare, for the protection of their industries from ruinous competition of unscrupulous employers, for the

protection of an unorganized class of employes from receiving less than the true value of their services, and for the allieviation of unemployment with its attendant relief and taxation burden, contravenes no provision of the Constitution of the United States. Such legislation is vital to the preservation of the economic security of the states and should be sustained.

Many other states, including Ohio, having enacted laws similar to this New York Law held unconstitutional by the court of last resort of that state, it is submitted in conclusion that this Court should review the decision of the Court of Appeals of New York and upon final consideration thereof sustain the constitutionality of this New York Law.

Respectfully submitted,

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APPENDIX A.

TABLE III—PROPORTION OF FEMALES 10 YEARS OLD AND OVER GAINFULLY OCCUPIED, BY AGE, OHIO, 1900 AND 1930.

Age	Total Number	Gainfully Occupied	
		Number	Percent
1900[1]			
Total	1,626,326	246,071	15.1
10 to 24 years	608,188	120,603	19.8
25 to 44 years	596,445	86,450	14.5
45 years and over	419,524	38,624	9.2
Unknown	2,169	394	....
1930[2]			
Total	2,688,005	539,606	20.1
10 to 24 years	879,983	195,371	22.2
25 to 44 years	988,556	230,581	23.3
45 years and over	818,105	113,174	13.8
Unknown	1,361	480	....

[1] **Twelfth Census of the United States, 1900, Vol. II, Population,** pp. 78-79: **Special Reports, Occupations,** Table 41, p. 363.

[2] **Fifteenth Census of the United States, 1930, Population, Vol. IV, Occupations, by States,** Table 8, p. 1267.

APPENDIX B.

AVERAGE (OR MEDIAN) WAGES PER WEEK FOR FEMALES AND FOR MALES IN WOMAN-EMPLOYING INDUSTRIES IN OHIO, 1929, 1932, AND 1934.

	1929			1932			1934		
	Male	Female	Percent women's wages form of men's wages	Male	Female	Percent women's wages form of men's wages	Male	Female	Percent women's wages form of men's wages
All industries	$31	$16	51.6	$23	$13	56.5	$23	$14	60.9
Boots and shoes	27	16	59.3	20	12	60.0	22	15	68.2
Metal and metal products	29	17	58.6	22	14	63.6	21	14	66.7
Printing and publishing	33	16	48.5	28	14	50.0	27	14	51.9
Rubber products	36	20	55.6	26	14	53.8	28	16	57.1
Stone clay and glass	28	15	53.6	21	13	61.9	20	14	70.0
Men's clothing	33	19	57.6	22	13	59.1	26	15	57.7
Women's clothing	41	16	39.0	33	11	33.3	36	15	41.7
Hosiery and knit goods	24	17	70.8	19	13	68.4	19	15	78.9
Tobacco	22	15	68.2	19	11	57.9	18	13	72.2
Electrical machinery	30	19	63.3	23	14	60.9	22	15	68.2
Hospitals	21	14	66.7	18	12	66.7	16	13	81.3
Hotels	17	13	76.5	14	11	78.6	14	12	85.7
Laundries and dry cleaners	31	15	48.4	23	11	47.8	21	12	57.1
Restaurants	19	13	68.4	14	10	71.4	15	11	73.3
Stores retail and wholesale	27	16	59.3	23	13	56.5	20	14	70.0
Telephone and telegraph	28	17	60.7	31	18	58.1	32	18	56.3

67. Computed from wage data contained in Department of Industrial Relations, Division of Labor Statistics, **Report No. 26, Rates of Wages, Fluctuation of Employment, Wage and Salary Payments in Ohio, 1929,** Table I; and unpublished wage data compiled by the Ohio Division of Labor Statistics for 1932 and 1934.

PROPORTION OF MALES AND FEMALES WITH WEEKLY RATES OF LESS THAN $10 AND $20 AND OVER, IN 16 WOMAN-EMPLOYING INDUSTRIES IN OHIO, 1929, 1932, AND 1934.

Industry and Sex	1929		1932		1934	
	Percent with weekly rates of—		Percent with weekly rates of—		Percent with weekly rates of—	
	Less than $10	$20 and more	Less than $10	$20 and more	Less than $10	$20 and more
All industries:						
Males	1.7	88.1	6.9	63.1	3.3	62.0
Females	8.4	25.5	25.8	11.0	9.6	11.3
Boots, shoes, cut stock and findings:						
Males	1.6	73.7	8.4	51.6	4.5	58.8
Females	9.2	28.5	31.7	7.7	3.3	11.3
Metal and metal products:						
Males	0.6	87.8	2.5	61.7	0.7	57.2
Females	1.7	20.8	15.8	6.9	1.2	4.2
Printing and publishing:						
Males	11.0	73.8	13.0	68.8	8.7	68.3
Females	2.3	27.1	10.0	14.2	2.2	10.1
Rubber products:						
Males	0.3	95.6	0.4	81.5	1.9	85.8
Females	1.3	53.1	9.2	11.1	0.6	10.1
Stone, clay and glass:						
Males	0.9	84.4	4.0	53.0	1.1	46.1
Females	7.5	16.0	17.0	5.8	4.1	3.8
Men's clothing:						
Males	0.9	80.9	6.9	56.4	0.2	68.2
Females	5.2	43.2	30.5	12.7	2.3	23.2
Women's clothing:						
Males	1.1	89.0	2.6	79.1	....	82.1
Females	10.7	29.1	41.1	9.6	4.1	24.3
Hosiery and knit goods:						
Males	1.2	64.8	5.5	46.9	0.5	41.8
Females	3.7	27.7	15.5	12.4	2.3	14.4
Tobacco:						
Males	4.1	61.2	10.5	43.9	4.7	43.0
Females	18.6	10.0	35.4	0.5	14.5	0.3
Electrical machinery:						
Males	0.2	91.1	1.4	67.5	3.2	58.6
Females	1.0	41.1	9.4	7.8	2.8	8.6
Hospitals:						
Males	6.5	54.2	11.9	41.1	10.5	32.3
Females	28.4	31.3	32.8	23.5	29.3	21.6
Hotels:						
Males	12.8	39.0	26.0	26.5	21.4	21.8
Females	11.3	8.8	37.3	5.0	26.2	2.1
Laundries, dry cleaners:						
Males	1.3	85.9	5.6	61.1	2.7	56.3
Females	8.0	13.2	36.9	3.8	17.9	2.4
Restaurants:						
Males	7.7	44.4	23.9	23.3	11.6	20.0
Females	18.2	10.2	48.9	2.9	32.2	1.8
Stores, retail and wholesale:						
Males	2.8	80.4	5.9	62.9	4.0	51.3
Females	9.0	23.7	21.2	12.8	6.5	11.2
Telephone and telegraph:						
Males	6.1	82.0	10.0	78.7	12.6	72.9
Females	4.7	27.0	5.9	34.3	6.7	36.2

IN THE

Supreme Court of the United States

OCTOBER TERM—1935

No. 838.

FREDERICK L. MOREHEAD, as the Warden of the City Prison of the Borough of Brooklyn, *Petitioner*,

v.

PEOPLE *ex rel.* JOSEPH TIRALDO, *Respondent*.

BRIEF AS AMICI CURIAE

On behalf of the National Woman's Party, National Association of Women Lawyers, Bindery Women's Union, Local No. 66 of the International Brotherhood of Bookbinders, Brooklyn-Manhattan Transit Women's League, Business Women's Legislative Council of California, and Women's Equal Opportunity League of New York.

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EYNON PRINTING COMPANY, INC., WASHINGTON, D. C.

INDEX

SUBJECT INDEX

PAGE

Summary of Argument 1

I. The decision of the Court of Appeals holding the New York Minimum Wage Law for women invalid is in accord with the applicable decisions of this Court 3

II. The New York Minimum Wage Law for women is not within the police power of the State 6

III. There is nothing about the New York Minimum Wage Law for women to justify a ruling different from that in *Adkins* v. *Children's Hospital*, 261 U.S. 525 13

1. The factual backgrounds are fundamentally the same. 13

2. There is no substantial difference between the provisions of the two statutes. 18

3. The reasons given in the Adkins case for holding the District of Columbia law unconstitutional apply with equal force to the New York law. 23

4. The Court of Appeals of New York has held that there is no essential difference between the two statutes. 24

IV. The application of the Minimum Wage Law to women and their employers *only* does not bring it within the limits of the Constitution 25

TABLE OF CASES

	PAGE
Adair v. United States, 208 U.S. 161	3
Adkins v. Children's Hospital, 261 U.S. 525	2, 3, 10, 23, 34
Barbier v. Connolly, 113 U.S. 27	26
Children's Hospital v. Adkins, 284 Fed. 613	6, 11
Connolly v. Union Sewer Pipe Co., 184 U.S. 540	27
Coppage v. Kansas, 236 U.S. 1	3, 9
Cotting v. Godard, 183 U.S. 79	27
Donham v. West-Nelson Mfg. Co., 273 U.S. 657	4
Frisbie v. United States, 157 U.S. 160	11
Gulf, Colorado & Santa Fe R. Co. v. Ellis, 165 U.S. 150	27, 28
Jones v. Prairie Oil Co., 273 U.S. 195	25
Jones v. Securities & Exchange Commission U.S. Law Week, Vol. 3, No. 32, p. 17	28
Minor v. Happersett, 21 Wall. 162	25
Missouri K. & T. R. Co. v. May, 194 U.S. 267	27
Murphy v. Sardell, 269 U.S. 530	4
Nebbia v. New York, 291 U.S. 502	5
Near v. Minnesota, 283 U.S. 697	5, 6
Ribnik v. McBride, 277 U.S. 350	4
Schechter Corp. v. United States, 295 U.S. 495	18
Truax v. Corrigan, 257 U.S. 312	12
Truax v. Raich, 239 U.S. 33	8, 28
West et al. v. Chesapeake & Potomac Telephone Co., 295 U.S. 662	19
Wolff v. Court of Industrial Relations, 262 U.S. 522	4, 8
Yick Wo. v. Hopkins, 118 U.S. 356	27

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BRIEF AS AMICI CURIAE

SUMMARY OF ARGUMENT.

The judgment of the Court of Appeals that the New York Minimum Wage Law for women is an unconstitutional interference with the liberty of contract guaranteed by the Fourteenth Amendment should be affirmed.

Under the decisions of this Court the right to buy or sell labor in any lawful pursuit is of the essence of the liberty guaranteed by the Constitution. The liberty of women is not of less degree or quality than the liberty of men. The challenged statute is invalid because it strikes at the heart of freedom of contract, an indispensable part of the liberty assured by the Constitution. The mere restriction of liberty or of property rights cannot of itself be called public welfare and treated as an object of the police power since such restriction is the very thing forbidden by the Constitution.

Time and again this Court has said that the fixing of wages as between employer and employee in private em-

ployments is beyond the legislative power. But even if wage-fixing be within this power, still the statute is invalid as it is arbitrary and discriminatory, there being no reason why its operation should apply to women and the employers of women and exclude men and their employers. As to every occupation where a statutory board has fixed a wage, women can not sell their labor nor employers buy it except at prices at or above the level set by the board. Men may work for any wages they please, or at least for the prevailing competitive wage. So men wage earners have freedom which is denied by the statute to women wage earners though both classes may be engaged in the same kind of labor, and even serving the same employer. Likewise, men's employers have freedom to purchase labor which the statute denies to women's employers and payment of wages less in amount than that fixed by a statutory board is made a crime on the part of women's employers but is no offense at all on the part of employers of men. The effect of the law is to promote unfair competition between men and women workers and to drive women out of employment. The statute submerges the intendment of the Fourteenth Amendment that no impediment be interposed to the pursuits of anyone except as applied to the same pursuit by others under like circumstances, and that no greater burdens be laid upon one than are laid upon others in the same calling and condition.

Accordingly, we will endeavor to show that

I. The decision of the Court of Appeals holding the New York Minimum Wage Law for women invalid is in accord with the applicable decisions of this Court.

II. The New York Minimum Wage Law for Women is not within the police power of the State.

III. There is nothing about the New York Minimum Wage Law for women to justify a ruling different from that in *Adkins* v. *Children's Hospital*, 261 U. S. 525.

IV. The application of the Minimum Wage Law to women and their employers *only* does not bring it within the limits of the Constitution.

I.

THE DECISION OF THE COURT OF APPEALS HOLDING THE NEW YORK MINIMUM WAGE LAW FOR WOMEN INVALID IS IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT.

It is settled that contracts of personal employment are a part of the liberty of men and women protected under the Fifth and Fourteenth Amendments to the Constitution. *Adair* v. *United States*, 208 U. S. 161; *Adkins* v. *Children's Hospital*, 261 U. S. 525. In *Coppage* v. *Kansas*, 236 U. S. 1, 14, this Court said:

> "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money."

In *Adkins* v. *Children's Hospital*, *supra*, this Court had under consideration an act of Congress authorizing the fixing of minimum wage standards for women and children in any occupation in the District of Columbia, such standards to be based upon what a board and its advisers might find to be an adequate wage to meet the necessary cost of living for workers in each particular calling and to maintain them in good health and protect their morals. The

legislation, so far as it affected women, was held by this Court to be "simply and exclusively a price-fixing law" and invalid because authorizing an unconstitutional interference with the liberty of contract in respect of terms of private employment. Later this Court affirmed judgments holding unconstitutional the Arizona and Arkansas minimum wage laws for women. *Murphy* v. *Sardell*, 269 U. S. 530. *Donham* v. *West-Nelson Mfg. Co.*, 273 U. S. 657. Thus in the three cases last cited the precise question now before this Court—the constitutionality of laws to fix minimum wages for women in private employments—was determined. The Court below in this case rightly regarded the *Adkins* decision as controlling.

This Court has consistently maintained that wage-fixing between employer and employee in private business is beyond the legislative power.

In *Wolff* v. *Court of Industrial Relations*, 262 U. S. 522, a statute of Kansas sought to compel employer and employee to submit wage controversies to state arbitration, and to require the employer to pay the wages so fixed Said the Court respecting the wage fixing:

> "We think the Industrial Court Act, in so far as it permits the fixing of wages in plaintiff in error's packing house, is in conflict with the Fourteenth Amendment and deprives it of its property and liberty of contract without due process of law."

In *Ribnik* v. *McBride*, 277 U. S. 350, 357, the Court below upheld a state statute as empowering the Commissioner of Labor to fix and limit the charges to be made by a person conducting an employment agency. This Court held the statute invalid as price-fixing legislation contravening the due process of law clause of the Fourteenth Amendment. Mr. Justice Sutherland, for the Court, said:

> "Under the decisions of this Court it is no longer fairly open to question that, at least in the absence of

> a grave emergency, . . . the fixing of prices for food or clothing, of house rental or of wages to be paid, whether minimum or maximum, is beyond the legislative power. And we perceive no reason for applying a different rule in the case of legislation controlling prices to be paid for services rendered in securing a place for an employee or an employee for a place."

Mr. Justice Hughes in *Near* v. *Minnesota*, 283 U. S. 697, 707 (a case dealing with liberty of the press), states for the Court:

> "So, while liberty of contract is not an absolute right, and the wide field of activity in the making of contracts is subject to legislative supervision (*Frisbie* v. *United States*, 157 U. S. 161, 165), this Court has held that the power of the State stops short of interference with what are deemed to be certain indispensable requirements of the liberty assured, notably with respect to the fixing of prices and wages."

The petitioner relies upon the case of *Nebbia* v. *New York*, 291 U. S. 502, to support the statute. In that case this Court held the milk business in New York to be affected with a public interest sufficient to justify the regulation of prices. Certain peculiar aspects of the milk business were the foundation of the finding, notably the relationship to public health which had made it a subject of drastic regulation for many years. Mr. Justice Roberts pointed out in the opinion that it was the function of the Court to determine "in each case" whether the regulation was "a reasonable exertion of the governmental authority" (page 536). There is nothing in that decision that would indicate that all businesses employing women are for that reason affected with a public interest. Such a holding would permit the State to control business to an extent unprecedented in liberal government. The mere working for a living in an ordinary occupation cannot itself be affected with a public interest or classed as a "business" in any sense.

To summarize, the deprivation of liberty imposed by the statute exceeds constitutional limits under the decisions of this Court. The attributes of liberty under the Constitution belong to women as to men. We borrow the language of the Court of Appeals of the District of Columbia:

> "The constitutional limitations . . . involve fundamental principles of human rights reserved to the whole people and not to any favored class of citizenship. They are for the protection alike of the rich and the poor, the strong and the weak, the high and the low, and may not, either by legislative or judicial fiat, be used to extend special protection or privileges to any particular class of citizens. No reason is apparent why the operation of the law should be extended to women to the exclusion of men, since women have been accorded full equality with men in the commercial and political world. Indeed, this equality in law has been sanctioned by constitutional amendment; and so fixed has the tendency in this direction become established in English-speaking lands, that the opportunity for official and business preferment, upon complete equality with men, is limited only by the scope of her aspirations." Children's Hospital v. Adkins, 284 Fed. 613, 618.

II.

THE NEW YORK MINIMUM WAGE LAW FOR WOMEN IS NOT WITHIN THE POLICE POWER OF THE STATE.

The authority of a state to enact laws to promote the health, safety, morals and general welfare of the people is necessarily conceded, but "the limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise." *Near* v. *Minnesota*, 283 U. S. 697, 707.

In the law in question the *particular subject* of the alleged exercise of the police power is the restriction of liberty—the liberty of contract—the very thing inhibited

by the Constitution. Moreover, it is unlimited as to the scope of its operation since it applies to all occupations except domestic service and work on a farm.

Liberty safeguarded by the Fourteenth Amendment cannot be invaded merely because a state legislature deems liberty of contract a menace and its deprivation to be in the interest of the public welfare. In other words, the police power cannot be made supreme over the Constitution by a statutory declaration that any action desired to be taken is an exercise of that power, and hence within the discretion of the legislature.

In *Near* v. *Minnesota, supra,* a statute declared one who engages in regularly publishing a malicious, scandalous and defamatory newspaper guilty of a nuisance and authorized suits to enjoin such newspaper from future violations. It was claimed that the statute was passed in the exertion of the State's power of police for the preservation of the peace and good order of the State. The authorized proceedings in restraint of publication were held inconsistent with the conception of the liberty of the press under the Fourteenth Amendment. Said the Court in part (p. 721):

> "Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke assaults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication. . . . There is nothing new in the fact that charges of reprehensible conduct may create resentment and the disposition to resort to violent means of redress, but this well-understood tendency did not alter the determination to protect the press against censorship and restraint upon publication. . . . The danger of violent reactions becomes

> greater with effective organization of defiant groups resenting exposure, and if this consideration warranted legislative interference with the initial freedom of publication, the constitutional protection would be reduced to a mere form of words."

The case of *Wolff* v. *Court of Industrial Relations*, 262 U. S. 522, involved a statute of Kansas providing among other things for the submission of wage controversies between employer and employee in the meat packing industry to state arbitration and requiring the employer to pay the wage so fixed. Notwithstanding the declaration of the statute that the industry was affected by a public interest and that the statute was for the protection of public peace, health and general welfare, this Court recognized the statute for what it was—an unlawful restriction upon the liberty of contract between employer and employee in a private business.

It is asserted that the statute in question is one which is reasonable to meet the evils at which it is aimed. *But the rule that a State may recognize degrees of evil and adapt its legislation accordingly, applies to matters concerning which the state has authority to legislate.* In *Truax* v. *Raich*, 239 U. S. 33, 41, an Arizona statute made it a criminal offense for an employer having more than five employees to employ less than eighty per cent qualified electors or native born citizens of the United States. It was sought to justify this act as an exercise of the power of the State to make reasonable classifications in legislating to promote the health, safety, morals, and welfare of those within its jurisdiction. It was contended that the employment of aliens unless restrained was a peril to the public welfare. The Court said in part:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of

> the Amendment to secure. . . . If the restriction to twenty per cent now imposed is maintainable the State undoubtedly has the power if it sees fit to make the percentage less. We have nothing before us to justify the limitation to twenty per cent, save the judgment expressed in the enactment, and if that is sufficient, it is difficult to see why the apprehension and conviction thus evidenced would not be sufficient were the restriction extended so as to permit only ten per cent of the employees to be aliens or even a less percentage, or were it made applicable to all businesses in which more than three workers were employed instead of applying to those employing more than five. We have frequently said that the legislature may recognize degrees of evil and adapt its legislation accordingly . . .; but underlying the classification is the authority to deal with that at which the legislation is aimed. The restriction now sought to be sustained is such as to suggest no limit to the State's power of excluding aliens from employment if the principle underlying the prohibition of the act is conceded. No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment, for as we have said it relates to every sort. The discrimination is against aliens as such in competition with citizens in the described range of enterprises and in our opinion it clearly falls under the condemnation of the fundamental law."

It is contended that women are not upon a level of equality in bargaining with their employers and that the statute is in furtherance of freedom of contract. The same claim was made with reference to the statute considered in *Coppage* v. *Kansas*, 236 U. S. 1, 5. There the statute made it a crime for an employer to require an employee to agree not to become or remain a member of any labor organization during his employment. The evidence was that it would have been to the advantage of the employee from a pecuniary point of view and other-

wise to have been permitted to retain union membership and at the same time to remain in the employ of the company. After referring to several cases in which the police power was properly exercised for the preservation of the public health, safety, morals or general welfare, the Court pointed out that there was no purpose in the statute having reference to health, safety, morals, or public welfare, beyond the supposed desirability of leveling inequaliites of fortune by depriving one who has property of some part of what is characterized as his "financial independence." Said the Court (pp. 18, 19):

> "In short, an interference with the normal exercise of personal liberty and property rights is the primary object of the statute, and not an incident to the advancement of the general welfare. But, in our opinion, the Fourteenth Amendment debars the States from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. *The mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare,' and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment.*" (Italics ours.)

In the *Adkins* case the Court of Appeals of the District of Columbia differentiated between a law fixing the price of labor and enactments within the police power for the public health, safety, morals or welfare as follows:

> "The public safety and welfare may justify the legislature in limiting the hours of labor in mines and other hazardous industries, and require safeguards to be employed in conducting dangerous occupations. Such regulations, however, affect only the mode of operation and do not invade the domain of prices. They are easily distinguished from the purely economic question of how much the employer shall pay

the employee for his services. In one case the business conducted is so inherently dangerous that its regulation, as to methods of operation, becomes a valid exercise of the police power. The public health and safety demand, not that the business be confiscated, not that proprietorship therein be curtailed or limited, not that the economic control thereof may be in the least affected, but that the business be so conducted that the public health and safety may not be seriously endangered.

"Legislation tending to fix the prices at which private property shall be sold, whether it be a commodity or labor, places a limitation upon the distribution of wealth and is aimed at the correction of the inequalities of fortune which are inevitable under our form of government due to personal liberty and the private ownership of property. These principles are embodied in the Constitution itself, and to interfere with their freedom of operation is to deprive the citizen of his constitutional rights." Children's Hospital v. Adkins, 284 Fed. 613, 616.

This Court in *Frisbie* v. *United States*, 157 U. S. 160, 166, cites instances of the valid exercise of the police power and then states:

> "The possession of *this power* by government in no manner conflicts with the proposition that, generally speaking, *every citizen has a right freely to contract for the price of his labor,* services, or property." (Italics are ours.)

If a *minimum* wage for women alone is justifiable because a legislative fiat says their bargaining power is not on a level of equality with their employers it is difficult to see why a *maximum* wage for women may not be fixed if high wages are declared by the legislature to be destructive of industry, and against public welfare. If there is no constitutional objection to a *minimum* wage law applying to women alone, presumably there would be none applying to a *maximum* wage for women alone if the legis-

lature should conclude that women may be specially classified as requiring or needing less than men or having fewer dependents or possessing greater wealth than men. Section 564 of the law in question places a burden on every employer of women in the state regardless of whether or not employment conditions in his industry or business are good or bad. He must keep a true and accurate record of all women employed, the hours worked by each, the wages paid to each, and he must furnish upon demand a sworn statement of the same. No such burden is imposed upon the employers of men. If a law creating these burdens and fixing a minimum wage for women is valid, then there would seem to be no reason why the legislature may not go further and require employers of women to provide transportation for women workers to and from work on the theory that crowded conveyances are harmful to the health and maternal function of women, and that the wages paid are less than they ought to be.

There is no liberty more fundamental than the right to work subject only to those restraints imposed upon others in like conditions and calling. To take from women freedom to contract to work for wages for which men may work in practically every occupation in an entire state is to hold that the right to labor for pay is primarily the prerogative of the male, and that women are wards or serfs who are only allowed to work for special wages under special supervision and subject to special Governmental regulations. Such a conclusion is at variance with our system of law which is based on the fundamental principle of equality. *Truax* v. *Corrigan*, 257 U. S. 312, 332.

III.

THERE IS NOTHING ABOUT THE NEW YORK MINIMUM WAGE LAW FOR WOMEN TO JUSTIFY A RULING DIFFERENT FROM THAT IN ADKINS v. CHILDREN'S HOSPITAL, 261 U. S. 525.

The effect of the petition to overrule the decision of the Court of Appeals of New York in this case is to ask this Court to reconsider its decision in *Adkins* v. *Children's Hospital, supra.*

1. The factual backgrounds are fundamentally the same.

2. There is no substantial difference between the provisions of the two statutes.

3. The reasons given in the Adkins case for holding the District of Columbia law unconstitutional apply with equal force to the New York law.

4. The Court of Appeals of New York has held that there is no essential difference between the two *statutes.*

1. The Factual Backgrounds are Fundamentally the Same.

The situation considered by the New York Legislature is described briefly in Section 550 of the Act. Every fact there mentioned was urged upon this Court in the arguments of Government counsel for sustaining the District of Columbia statute in 1923.

> "Section 550. The employment of women and minors in trade and industry in the State of New York at wages unreasonably low and not fairly commensurate with the value of services rendered is a matter of grave and vital public concern. Many women and minors employed for gain in the State of New York are not as a class *upon a level of equality in bargaining* with their employers in regard to minimum fair wage standards and '*freedom of contract*' as applied to their relations with their em-

ployers is illusory. Since a very large percentage of such workers are *obliged from their week to week wages to support themselves* and others who are dependent upon them in whole or in part they are, by reason of their necessituous circumstances, forced to accept whatever wages are offered them. Judged by any reasonable standard, wages are in many cases fixed by chance and caprice and the wages accepted are often found to bear no relation to the *fair value* of the service rendered. Women and minors employed for gain are *peculiarly subject to the overreaching of inefficient, harsh or ignorant employers* and under unregulated competition where no adequate machinery exists for the effective regulation and maintenance of minimum fair wage standards, the standards such as exist tend to be set by the least conscionable employers. In the absence of any effective minimum fair wage rates for women and minors, the constant lowering of wages by unscrupulous employers constitutes a serious form of *unfair competition* against other employers, reduces the purchasing power of the workers and threatens the *stability of industry*. The evils of oppressive, unreasonable and unfair wages as they affect women and minors employed in the State of New York are such as to render imperative the exercise of the police power of the state for the protection of industry and of women and minors employed therein and of the public interest of the community at large in their health and well-being and in the prevention and the deterioration of the race. In the considered judgment of the legislature this article is constitutional." *Laws of New York*, 1933, ch. 584, Art. 19, Sec. 550. (Italics are ours.)

The *weakness of the bargaining power* of women was referred to as "notorious" in the brief submitted by the attorneys for the District of Columbia in the *Adkins* case, *Transcript of Records and file copies of Briefs*, Vol. 115, October Term 1922, p. 912 of Brief for Appellants.

The reference to *"freedom of contract" being illusory*

in the statute is very similar to language used in the brief referred to above on page lii where a sub-heading is entitled

> "Seventh.—The so-called 'liberties' of which the plaintiffs claim to have been deprived were merely fanciful and theoretical and not substantial. Therefore it was not 'arbitrary, wanton' or a 'spoliation' for Congress to allow great public interest to prevail over them."

And in the course of the discussion of this point, counsel said: "Similarly the 'liberty' which Lyons asserts is fictitious, unreal and against her own interest" (p. liv).

That women worked in 1923 because they *were obliged to support themselves* was also brought out clearly in the Government brief in the *Adkins* case. Beginning on page 872 of the brief is found a sub-division entitled:

"(4) The Bulk of Wage-earning Women Must Support Themselves."

This contains information about conditions in the District of Columbia and other places. Also in the brief on the Oregon Minimum Wage cases used in the *Adkins* case we find an argument concerning what is termed the "pin money fallacy". *Transcript of Records and File Copies of Briefs*, Vol. 116, October Term 1922, Briefs in Oregon Minimum Wage Cases, p. 290.

That women frequently did not receive the *fair value* of their services in wages was pointed out several times in these briefs with the assumption always that the cost of maintaining a worker is a measure of the value of the work. The sub-heading on the subject in the Brief for Appellants is found on page xl of the brief. On page xxxviii it is pointed out that women receive less than men for the same work as an indication that they do not receive fair value. Similar arguments are found in the Brief on the Oregon Minimum Wage Cases referred to above.

That *women were peculiarly subject to the overreaching of harsh employers* in 1923 was claimed in the Government's brief on page xlv where it is stated:

> ". . . Congress . . . may fill the gaps caused by ignorance or helplessness of women workers and the ignorance or avarice of some employers. . . ."

It would seem that this particular disadvantage of women is not so marked in New York today as it was in 1923. This is indicated by Chart V in the factual brief submitted by petitioner here. It is opposite page 30 of that brief and shows that the difference between the wages of men and women has lessened between 1923 and 1935, and that particularly in the depression years 1929 to 1934 women's wages did not drop as abruptly as did men's.

The fact that the lowering of wages by unscrupulous employers constituted even in 1923 a serious form of *unfair competition* against other employers was emphasized in the Government's brief then submitted on page xlv et seq. The sub-heading covering the discussion is entitled:

> "Fourth,—It is not arbitrary, wanton or spoliative for Congress to require the employer to obtain a license from the Board before he can buy a woman's labor at less than cost, because that is a reasonable means of preventing cutthroat and unfair competition between manufacturers."

The assertion is made on page xlvii that:

> "It is impossible for the state to remain neutral in a contest between men who desire to deal fairly and those who desire to deal unfairly; The state must choose between encouraging unfair conduct by keeping hands off or discouraging it by insisting upon fair play."

Similar arguments are advanced in the brief in the Oregon Minimum Wage Cases. *Transcript of Records*

and File Copies of Briefs, Vol. 116, October Term 1922, p. A35, p. 330-353.

The need for the *protection of industry as a whole* by minimum wage legislation was an almost constant theme in the Government's briefs in the earlier cases. The District of Columbia claimed that the prevention of the employment of women at "below cost" was a reasonable exercise of power to foster the productivity of industry. Benefits to employers generally were discussed in a series of statements beginning on page 334.

In addition to the factual background set out in Section 550 of the statute, petitioner has submitted in a factual brief material which it is claimed was undisputed in the lower courts. The significance of the facts set out is difficult to determine because some of the tables show wages for females from the age of ten years and some from the age of fifteen. With many of the tables, there is no explanation of what ages are included so that it is impossible to ascertain which facts apply to adult women. However, an examination of the outline of the factual brief as given on page iii will show that the facts given are of the same nature as those submitted to this Court in briefs in the *Adkins* case.

There are statistics and reports tending to prove the success of such legislation where it has been in operation (Point VIII Factual Brief) corresponding in some degree to information furnished along the same lines in the *Adkins* brief. *Transcript of Records and File Copies of Brief, supra*, Brief for Appellants pp. 1-541.

There are possibly two factors in the New York situation which differ somewhat from the District of Columbia background. There are, of course, more working women in New York State than there were in the District of Columbia in 1923, but it is shown that the discrepancy in their wages as compared to men's is not so great now as it was in 1923 (Chart V, opposite p. 30 Factual Brief

of Petitioner). The other different factor is the precarious condition of industry claimed to exist in New York today. It is true that many arguments were produced in the *Adkins* case to the effect that Industry would destroy itself if it paid less in wages than the cost of support of the workers, but we must all admit that industry is more hard-pressed in New York today than it was in the District of Columbia in 1923.

This Court has stated:

> "Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power." Schechter Corp. v. United States, 295 U. S. 495, 528.

It is inconceivable that after refusing to sanction minimum wage legislation for women designed to protect their health and morals, this Court would hold such legislation constitutional to prevent "cutthroat" competition.

2. There is no Substantial Difference Between the Provisions of the Two Statutes.

Both laws provide for investigation by conferees, similarly selected, of the wages of women and minors in various occupations, 40 *Stat.* 960 C. 174, Sec. 10; *Laws of New York* 1933, Ch. 584, Art. 19, Sec. 554, and for compulsory adherence to the recomendation when approved by the Wage Board, 40 *Stat.* 960 C. 174, Sec. 12, 18; *Laws of New York* 1933 Ch. 584, Art. 19, Sec. 557, 560, 565. The District of Columbia law which was held unconstitutional set up a standard of minimum wage to be fixed by law which should be "adequate to supply the necessary cost of living to women workers to maintain them in good health and to protect their morals", while the New York

law defines an "oppressive and unreasonable wage" which is to be forbidden by the statute as "a wage which is both less than fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary to health."

It is submitted that the words added in the New York statute do not change in any way the effect of the legislation, because the standard which the wage board is called upon to set up cannot be practically determined. The board is faced with the question as to what is the fair value of a woman's service in the industry it is investigating. By what method is it to measure that value? As a general rule in damage cases or quantum meruit cases in asumpsit, the value of services is measured by customary wages. But of course market value is not to be used here as the employer pays that without coercion. Will it be cost value—the cost of raising a worker to womanhood and educating her sufficiently for the job? If it is to be cost value, shall any amount be deducted for depreciation and obsolescence? Is anything to be deducted for the usefulness of the girl in her home? Is each girl to be considered as a separate problem, or is the board permitted to estimate an average? In a recent case this Court said:

> "To an extent value must be a matter of sound judgment, involving fact data. To substitute for such factors as historical cost and cost of reproduction, a 'translator' of dollar value obtained by the use of price trend indices, serves only to confuse the problem and to increase its difficulty, and may well lead to results anything but accurate and fair. This is not to suggest that price trends are to be disregarded; quite the contrary is true. And evidence of such trends is to be considered with all other relevant factors." West et al, v. Chesapeake & Potomac Telephone Co., 295 U. S. 662, 671-672.

Public Utility Commissions and Courts have encountered

enormous difficulties in determining valuations of rail roads and telephone companies. In the case just referred to,the company, the commission, the District Court, each had a different scheme for determining the value, not one of which was approved by this Court and even this Court was in the end divided as to the significance of the calculations. Inevitably similar difficulties will be encountered whenever market value is ruled out. It is submitted that the determination of the value of the work of individual human beings presents still more complicated factors and the problems will be impossible of solution.

But this law does not contemplate fixing of value in individual cases. Although in the very nature of things the value of services must necessarily vary according to individual capacity, efficiency, training and age; yet this law ignores all that and requires the fixing of a theoretical rate for an entire class and an entire industry which must be enforced on women whose services are worth twice as much as well as upon those who might be cut to much less and who could only secure much less. There is reason to believe that neither the legislators nor the wage boards selected have contemplated calculations based on absolute value. Advocates of minimum wage legislation in 1923 and 1933 assume that labor is worth its cost and by that they mean the cost of the support of the worker, but this is the very standard which was held to be one-sided and too vague for determination, in the previous opinion of this Court. Several times in the briefs in the *Adkins* case it was pointed out that to permit an employer to pay less than a wage sufficient for the maintenance of the worker was to subsidize his business. The same thing has been said here. *Brief on petition for certiorari filed by Ohio* p. 44; *Factual brief for petitioner* p. 39. The report of the Laundry Wage Board (*Factual Brief,* p. 66) indicates that its investigation consisted in determining how near the "living wage" they could place

the minimum standard without destroying the industry. The value of services under hoped for conditions was considered rather than the value under actual conditions.

The great diversity of wages paid in the laundry industry is taken as an indication that some workers do not receive fair value for services. But this situation is no different from that in many markets where there is subtle difference of quality. For example, chocolate creams can be purchased at any price from 20 cents to $2.00 per pound. Ladies manufactured silk dresses may cost anything from $4.98 to $75.00. There is a difference in quality, of course, but it is hard to perceive that it is commensurate with the difference in price.

In the *factual brief* of petitioner, a whole section of sixty-nine pages (Sec. VII pp. 76 to 145) is devoted to a discussion of methods which might be employed to fix group wages on the basis of value of services. A cursory examination of the material will reveal that all of the methods suggested are rather complicated. A more careful examination will reveal that in almost every method described, either market value or cost of living, is an important factor in the calculation. As a matter of fact, most of the material there presented consists of descriptions of various methods of determining the *relative* value of services of various employees in the same establishment.

Section A, Examples (1) and (2) give no hint of the method used to determine the basic value of services. In example (3), both market value and the standard of living are indispensable factors under the names "Trade Union scales", "Labor supply available" and "Standards of living of social group represented in each occupation." Example (4) describes a study in the *relative* value of jobs in certain companies but it is made plain that the "market" is considered in establishing the rates (p. 86). On page 88, it is said:

> "A base, or zone rate is one which will attract and hold with reasonable turnover the willing service of men having the requisite skill to produce the quality product desired, without regard to extra compensation paid as incentive."

Section B (p. 93) consists of descriptions of methods of collective bargaining used in various industries. It is difficult to see what persuasive force this can have in connection with minimum wage laws. But even here, the problem seemed to be in examples (1), (2) and (3) to find a method for determining *relative* value of various employees, base rates of pay having been determined beforehand. In example (4) the element of "purchasing power" and the right of every man to earn a living is admittedly one of the chief considerations in determining a fair wage (p. 104).

In Section C, (p. 107) the instances given show investigation of "facts" by certain committees. The factors to be considered are listed in example (3) on page 108. They include "The scales of wages paid for similar kinds of work in other industries" and "The relation between wages and cost of living.".

Similar analysis of the remaining sections will reveal no method of determining the absolute value of a day's work to the employer in any terms except market value or cost of living. If the market value is the criterion, no minimum wage law is necessary. If cost of living is the criterion, the payment cannot be forced upon the employer at pain of imprisonment or abandonment of business.

3. The Reasons Given in the Opinion in the Adkins Case For Holding the District of Columbia Law Unconstitutional Apply with Equal Force to the New York Law.

The first point made in the opinion in the *Adkins* case was that the same test must be applied to the law as would be applied to a law affecting the employment of adult men. Certainly there is no reason for changing that conclusion thirteen years later with women constantly becoming stronger.

It was mentioned that the law applied to any and every occupation in the District of Columbia without regard to its nature or to the character of the work. This is just as true of the New York statute. In both instances the application of the law is only limited by the requirement of investigation of particular occupations before enforcement of a standard. Both statutes except domestic service *40 Stat.* 960 C 174, Sec. 1; C. 584 *Laws of New York,* Article 19, Sec. 551 (6). No opportunity is given to determine whether the business is sufficiently affected with a public interest to justify regulation of it.

Another objection to the District of Columbia Law was the vagueness of the standard for the guidance of the Board in determining the minimum wage. The Court said:

> "What is sufficient to supply the necessary cost of living for a woman worker and maintain her in good health and protect her morals is obviously not a precise or unvarying sum—not even approximately so. . . . the inquiry in respect of the necessary cost of living and the income necessary to preserve health and morals presents an individual and not a composite question, and must be answered for each individual and considered by herself and not by a general formula prescribed by a statutory bureau." Adkins v. Children's Hospital, supra, p. 555, 556.

It is submitted that the fair value of services is an even less precise and unvarying sum than the cost of living and presents an even more individual question.

Further objection is made by the Court to the fact that the necessities of one party to the contract, the employer, are ignored. We have shown above that this matter is not cured by the additional phrase in the New York law requiring the minimum wage to be at least a fair return for value of services. It should be noted that the necessities of the particular workers who may be forced to find more arduous employment are also ignored. As has been pointed out, the Act specifically excepts domestic service (Section 551 (6)). It requires no great stretch of the imagination to see that with laundry prices rising, people are likely to hire laundresses to work at home and perhaps pay them less than they earned in the commercial plants.

The fact is also brought out in the opinion, that any reasoning which would justify the fixing of a minimum wage by the exercise of the police power might also justify the fixing of a maximum wage by the same power. The reasoning in this connection is just as applicable to the New York law as it was to the District of Columbia law.

And finally the Court held that social justice is best served by the preservation of liberties. This is of course an axiom of our form of government and is as true in 1936 as it was in 1923.

4. The Court of Appeals of New York has Held that there is no Essential Difference Between the Two Statutes.

It is submitted that the construction of the New York Statute by the highest Court of that state should carry great weight here. Justice Holmes has stated, speaking for this Court:

> ". . . no case yet has gone to the length of undertaking to correct the construction of State laws by State courts. The exclusive authority to enact those laws carries with it final authority to say what they mean. The construction of those laws by the Supreme Court of the State is as much the act of the State as the enactment of them by the legislature." Jones v. Prairie Oil Co., 273 U. S. 195, 199-200.

It is true that the holding of unconstitutionality both as to the United States Constitution and the New York Constitution was in deference to an opinion of this Court. But if the Court of Appeals had been of the opinion that the statute of New York had features which should take it out of the *Adkins* ruling, it would not have hesitated to say so. But the Court of Appeals of New York said: "We do not see wherein this act differs materially from the act of Congress ruled upon in Adkins v. Children's Hospital (261 U. S. 525)."

Therefore, it is plain that to reverse the decision in this case, this Court must either change the construction of a New York law by the highest Court of New York or reverse the conclusion reached in the *Adkins* opinion.

IV.

THE APPLICATION OF THE MINIMUM WAGE LAW TO WOMEN AND THEIR EMPLOYERS ONLY DOES NOT BRING IT WITHIN THE LIMITS OF THE CONSTITUTION.

The question "Are women people?" was answered in the affirmative sixty-two years ago by this Court with reference to the Fourteenth Amendment. *Minor* v. *Happersett*, 21 Wall. 162. Yet today the issue is, in effect, whether adult women are entitled to the liberty of contract included in the constitutional guarantee that no person shall be deprived of liberty or property without due

process of law. It is our view that women are entitled to this liberty.

As this Court points out in *Barbier* v. *Connolly*, 113 U. S. 27, 31:

> "The Fourteenth Amendment . . . intended . . . that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; . . . that no impediment should be interposed to the pursuits of any one except as applied to the same pursuit by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition. . . ."

At the time the Governor of New York approved the questioned statute he vetoed a companion bill known as the "Desmond Bill." The "factual back-ground" relating to women and minors which is contained in the statute is the same as the factual background stated in the vetoed measure with reference to *men and women and children*, the purpose of the vetoed measure being to establish minimum fair wage standards for men and women and minors during the present "serious public emergency." *Senate Bill Nos.* 1868, 2127; *Int.* 1652. There is no reason advanced in support of the minimum wage law for women which does not apply with equal or greater force to men workers whom the law leaves untouched. The evils at which the bill is said to be aimed apply to both men and women. More men are affected by them than women since there are more men workers than women, and consequently more people dependent upon men's earnings than upon women's. It is said that few women are organized and that their bargaining power is weak. It is a matter of common knowledge that of the total number of working men, only a small percentage is organized. Of the private wealth

in this country, more is owned by women than men. According to the statistics of insurance companies, women live longer than men. Much of the factual data supplied in all the minimum wage cases before this Court applies to both sexes. The law is arbitrary and discriminatory in that it singles women out and takes from them freedom to contract for wages for which men may contract. There is no reason why men should be excluded from the law except a mistaken philosophy that men's liberty is more sacred than women's and that attainment of the freedom accorded to others is something of which women are incapable. It is significant in this connection that men's labor organizations strenuously combat minimum wage legislation for *men* as of the essence of slavery itself, but they support such legislation for women. We submit that the statute is not in accord with constitutional guarantees as it is clear that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched. *Yick Wo.* v. *Hopkins*, 118 U. S. 356. *Gulf, Colorado & Santa Fe R. Co.* v. *Ellis*, 165 U. S. 150. *Missouri K. & T. R. Co.* v. *May*, 194 U. S. 267, 269. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540. *Cotting* v. *Godard*, 183 U. S. 79.

In one case where the inequality concerned the relative treatment of two parties in litigation, this Court said:

> "The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such

basis." *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 155.

The fact that the restriction on women's liberty is partial and not total, does not remove the objection to the constitutionality of the statute. *Truax* v. *Raich*, 239 U. S. 33. What this Court said in a recent case seems pertinent here:

> "And if the various administrative bureaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments, even petty encroachments, upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guarantees." *Jones* v. *Securities & Exchange Commission*, *U. S. Law Week*, Vol. 3, No. 32, p. 17, April 6, 1936.

The laws of about sixteen states and various articles, reports and comments are cited by petitioner in support of minimum wage legislation for women. If the statute is constitutional it is not necessary to show any sentiment in favor of it. If it is unconstitutional, it cannot be sustained no matter how many people may desire it. But to whatever extent such considerations are material, we point out that the majority of the states have no minimum wage legislation and that there is considerable sentiment in this country against it. There is in addition organized opposition to minimum wage legislation which restricts women's freedom to contract while preserving that of men.[1]

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[1] Among the organizations that have gone on record as opposed to minimun wage laws for women alone or opposed to all labor legislation applying to women and not to men are: National Woman's Real Estate Association; League of Advertising Women; American Alliance of Civil Service Women; Equal Rights Association; Women's Equal Opportunity League; National

This Court has often said that the right to work for a living in the occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. A law such as the one before the Court deprives women of the opportunity given to other workers in the community. Times of economic stress invariably involve the lowering of wages, and keen competition for jobs. A law fixing a minimum wage for women only and thus taking from them the power to contract for wages men are willing to accept obviously renders women ineffective as competitors of men. The woman who is unable to get the fixed wage may

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Association of Women Lawyers; National Woman's Party; Woman's Legislative Council of the State of Washington; Business Women's Legislative Council of California; Business and Professional Women's Club of Delaware; Vermont League of Business and Professional Women; New York State Federation of Business and Professional Women; New Hampshire Federation of Business and Professional Women's Clubs; Business and Professional Women's Council of New York State; Indiana Federation of Business and Professional Women; Telegraph Women of Minnesota; Legislative League of New York; New York State Women's Republican Club; Society for Political Study; Ray Current Events Club; Zonta Club of New York City; St. Paul Business and Professional Woman's Club; Brooklyn League of Business and Professional Women; Zonta Club of Albany; High School Teacher's Association of Los Angeles; Railway Business Women of St. Paul; Business and Professional Club of Alberta Lea, Minn.; Business and Professional Women's Club of Blue Earth, Minn.; The New Yorkers; Business and Professional Women's Club of Crookston, Minn.; Business and Professional Women's Club of Fairmont, Minn.; Business and Professional Club of Fairbault, Minn.; Brooklyn's Women's Bar Association; Zonta Club of St. Paul; Business and Professional Women's Club of Hibbing, Minn.; Business and Professional Women's Club of Montevideo, Minn.; Business and Professional Women's Club of Owatonna, Minn.; Women's Press Club of New York City; Business and Professional Women's Club of Rochester, Minn.; Business and Professional Women's Club of St. Cloud, Minn.; Business and Professional Club of Stillwater, Minn.; Soroptomist Club of New York City; Women's Welfare League of St. Paul; Business and Professional Club of Virginia, Minn.; Business and Professional Club of Wells, Minn.; Woman's Division 1st A. D. Republican Club of King's County; Bindery Women's Union, Local No. 66 of the International Brotherhood of Bookbinders; Business and Professional Women's Club of Winona, Minn.; and Brooklyn-Manhattan Transit Women's League.

suffer a total deprivation of her labor without compensation but a man is permitted to profit by his labor regardless of the amount of his remuneration. Adequate wages are desirable for everyone but it is better to have low wages than no wages at all.

Minimum wage legislation applying to women alone is not unlike that type of economic planning which reduces acreage and kills hogs. The difference is that the necessity of compensating the owners of the acreage or of the hogs is generally recognized by the law-making body, whereas the women who have labor to sell are not assured of any pay for the prevention of its sale.

Reports from state agencies concerned with minimum wage legislation indicate that such legislation handicaps women as to opportunities for employment.[2] Skilled

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[2] The Fifteenth Biennial Report of the Bureau of Labor and the State Welfare Commission of the State of Oregon, 1931-1932, states on page 22:

> "At a meeting of the State Welfare Commission some months later, after the canneries had started to operate, a delegation of working women appeared before the Commission and petitioned them to make a reduction in the minimum wage for women employes in canneries, contending that they were being discriminated against by the canneries, as boys and men could be hired for less than 27½ cents per hour. Many of these petitioners had dependents and they insisted that it was necessary that they be employed. They suggested that the minimum wage be reduced from 27½ cents per hour to 22½ cents per hour for the season of 1932. They felt that if this was done they could compete with men and could secure employment."

The Seventh Biennial Report of the Minimum Wage Department of the Workmen's Compensation Bureau of North Dakota for the biennium ending June 30, 1932, states on page 4:

> "Since the beginning of the current economic depression and continuing through to the present time there has been considerable agitation, particularly from employers of the public housekeeping and mercantile occupations, for reduced minimum wage schedules, many employers claiming that if forced to comply with the provisions of the minimum wage law they would necessarily be put out of business. Others replied to communications from this office that rather than pay the required minimums they would discontinue employing women workers entirely, and

workers are also affected by such legislation in that their wages are reduced to make up for increases in minimum wages.[3] It is significant that in certain provinces in Canada the displacement of women by men caused the passage of laws providing that a man who took the employment of a woman should receive the woman's minimum wage.[4]

It is not uncommon for men's labor unions to sponsor so-called "protective" legislation for women in order to protect them out of their jobs or else restrict their competition.[5] In this connection it is interesting to observe that in the brief filed here by the Attorney General of

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[3] See "The Need for Federal Labor Laws" by Elinore Morehouse Herrick, The Nation, July 10, 1935, p. 49, Col. 1; See also article by same person in New York Times Magazine, March 25, 1934, p. 16.

[4] The Year-Book of the International Labor office, 1934-35, states on page 193:

> "The Year-Book for 1933 drew attention to the peculiar situation which had arisen in Canada, where, as a result of the economic depression, *women workers for whom minimum wage rates had been fixed by legislation in most of the provinces were being replaced by unprotected workers of the other sex.* This situation has had a number of noteworthy consequences. For example, with a view to remedying the prejudice caused to female labour by the competition of the other sex and in order not to hinder the placing of women, steps were taken in 1933 to readjust temporarily the minimum rates fixed for women, which were reduced by about 10 per cent. generally and by 15 per cent. in certain cases. In 1934, a much more favourable measure was adopted in five provinces, which prohibited the employment of men at a lower rate than women: the Women's Minimum Wage Acts of British Columbia, Manitoba, Ontario, Quebec and Saskatchewan were amended by the insertion of a provision stipulating that when minimum wages are fixed for women, no male worker may be employed on the same work for a lower wage." (Italics are ours.)

[5] Bulletin No. 66-I, Women's Bureau, U. S. Dept. of Labor, pp. 66, 107, 114.

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place male help in their stead, no legal wage having been established for the latter.

See also: "Harvard 'Explains'", by Gardner Jackson in The Nation, February 19, 1930, p. 212; "Harvard Scrubwomen", Boston Herald, January 31, 1930, p. 16; and Editorial, Los Angeles Times, January 13, 1933, part 2, p. 4.

Ohio as amicus curiae in support of the petition for certiorari, he suggests the effect of Minimum Wage legislation for women on men's opportunities for employment. He states that the employment of women and minors at less wages than men will accept has resulted considerably in the replacement of men in industry by women and minors and that this result has contributed in some degree to the unemployment problem confronting the nation. He asks the Court to take judicial notice of the fact that the unemployment of men and likewise the difficulty of securing employment for them in industries in which women and minors have replaced them, has caused a drain upon the public treasuries of the nation, states and municipalities in the form of relief (pages 24 and 25). The Attorney General of New York in his factual brief for petitioner states (p. 24) that in many cases "women have been employed to replace men or to work with them in the same occupation because they could perform the work as well as men or better and could be hired at lower wages". If the unemployment among men is created by women undercutting them it is no solution of the economic problem to handicap women with a minimum wage in order that men may undercut them. One class of American citizen is just as much entitled to employment as another class. The limited opportunities of women in the industrial world as everywhere else, often force women to offer their services at lower rates than men do. When prejudice, union rules, and legal restrictions are relaxed sufficiently to admit women to all callings which they are capable of following, they will undoubtedly be able to demand higher pay. The teaching profession was underpaid for years because it was practically the only profession open to women. As soon as educated women began to find opportunities in other fields, teachers' salaries improved. Women in business and the professions know the temptation of overcom-

ing prejudice by lowering charges and fees. It is really not strange that each group of workers opposes the entry of women into its ranks. The remedy is a matter of opening all doors, not in weighting the scales still further against the woman worker.

Now the world is afflicted with a depression of unprecedented scope. Jobs have become scarce and the idea occurs to people throughout the world that the newest additions to the ranks of workers have caused it and must be eliminated or curbed. Undoubtedly wages would rise, at least temporarily, if any large group of workers could be eliminated from competition just as farm prices would rise when production is artifically curtailed. If all *men* were driven out of industry or even seriously hampered, it would doubtless be easier for *women* to find better jobs. In recent years many countries have tried to help the labor market by preventing work by foreigners and restricting immigration. They have also placed severe restrictions upon the work of women with the same object. And so it is that the women of the world have reached a point where there is danger of their progress being halted for reasons of temporary expediency.[6]

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[6] Report of the Fourth Conference of the Open Door International, 1935, p. 28:

"A most sinister and startling development of the last two years is the spread of this idea that it is justifiable to deprive women of work in the interests of the male worker, the application of this idea to single women, and its acceptance by governments of states claiming to be enlightened and civilized. The idea is seen in its naked ugliness in the many laws and orders intended to reduce the unemployment of men by aggravating that of women. Before our Prague Conference a beginning had already been made in Germany when the permanent appointment of women in Government service before the age of 35 was forbidden. To take other quite recent examples: In Luxembourg, by a Grand Ducal Decree of 14th April, 1934, a special permit is required before a public or private administrative department can appoint a female clerical staff, or retain a woman in employment after marriage. Yugoslavia, by an order of 31st March, 1934, has fixed the proportion of women higher

But we submit that the Constitution of the United States is still supreme in the United States and that the principles of constitutional liberty apply to women as well as to men. The Nineteenth Amendment gave them full political rights. The *Adkins* decision following closely thereafter gave them assurance that their fundamental liberties are recognized by the Courts. It may be said that their *Magna Charta* is found in the words of Mr. Justice Sutherland:

> ". . . We cannot accept the doctrine that women of mature age, *sui juris* require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances". *Adkins* v. *Children's Hospital*, *supra*, p. 553.

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grade postal servants at 30%, intermediate grade 25%, and lower grade 10%. The Netherlands Minister of the Interior has recommended Local Authorities (Circular dated 19th March, 1934) to replace women by men in posts not specifically requiring female labour. In Germany an Order of August 26th, 1934, gives priority of employment to male workers over 40 and to women who have family responsibilities. A German Act of July 8th, 1934, forbids married women doctors to practice except when this is absolutely necessary for the maintenance of their families. By another German Order of May 17th, 1934, women farm servants and agricultural workers are not allowed to be employed in canning factories, hotels, restaurants and cafes. An Italian legislative decree of November 28th, 1933, empowers administrative departments to exclude women or to limit their number, and, under this, percentage limits for women have been fixed at 5 for the higher grade, 15 for the intermediate, and 20 for the lower. Under a circular of the Belgian Council of Ministers of August 12th, 1934, all posts in public administrative departments, including typists and shorthand typists, are to be reserved for men so long as qualified candidates are available.

"In Italy under powers delegated to federations of employers and workers many corporate agreements have been made to restrict the employment of women. There are signs that similar dangerous delegated powers may be given to employers and workers in other countries."

It is urged that this Court uphold the Court of Appeals of New York in its preservation of the liberties of women.

Respectfully submitted,

BURNITA SHELTON MATTHEWS,

REBEKAH SCANDRETT GREATHOUSE,
Counsel for

National Woman's Party,
National Association of Women Lawyers,
Bindery Women's Union, Local No. 66 of the International Brotherhood of Bookbinders.
Brooklyn-Manhattan Transit Women's League,
Business Women's Legislative Council of California, and
Women's Equal Opportunity League of New York.

April 27, 1936.

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APR 27
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

No. 838.

FREDERICK L. MOREHEAD, as the Warden of the City Prison in the Borough of Brooklyn, *Petitioner*,

v.

PEOPLE *ex rel.* JOSEPH TIPALDO, *Respondent*.

BRIEF ON BEHALF OF STATES OF CONNECTICUT, ILLINOIS, MASSACHUSETTS, NEW HAMPSHIRE, NEW JERSEY AND RHODE ISLAND, AS AMICI CURIAE.

EYNON PRINTING COMPANY, INC., WASHINGTON, D. C.

INDEX.

	PAGE
Statement	1
I. The Existence of the Facts Underlying Constitutionality Must be Presumed by this Court and are Supported by Formal Legislative Findings	2
II. The Statute is a Fair and Reasonable One and is a Valid Exercise of the Police Power	5
A. The establishment and enforcement of minimum wages in a particular industry under the circumstances and pursuant to the method prescribed in the New York statute is not *prima facie* unconstitutional	8
B. The New York statute differs radically from that considered by this Court in the *Adkins* case	15

TABLE OF CASES CITED.

Adkins v. Children's Hospital, 261 U.S. 525	4, 7, 14
Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, 209	2
Bowersock v. Smith, 243 U.S. 29	9
Bunting v. Oregon, 243 U.S. 426	4
Central Lumber Co. v. South Dakota, 226 U.S. 157	3
Chicago Dock Co. v. Fraley, 228 U.S. 680	2
Clark v. United States, 95 U.S. 539	17
Close v. Glenwood Cemetery, 107 U.S. 466	2
Dakota Central Telephone Co. v. South Dakota, 250 U.S. 263	3
Delaware City, etc. Nav. Co. v. Reybold, 142 U.S. 636	17
Donham v. West-Nelson Manufacturing Co., 273 U.S. 657	15

PAGE

Federal Trade Commission v. Raladam Co., 283 U.S. 643 18
Gall v. Gall, 27 App. Div. 173 17
Great Northern R. Co. v. Weeks, U. S. Sup. Ct. Feb. 3, 1936 18
Goddard v. Foster, 17 Wall. 123 17
Hamilton v. Kentucky Distilleries Co., 251 U.S. 146 3
Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., 284 U.S. 151 2
Highland & Russel Car Co., 279 U.S. 253 18
Holden v. Hardy, 169 U.S. 366 20
Keokee Consolidated Coke Co. v. Taylor, 234 U.S. 224 3
Knoxville Iron Co. v. Harbison, 183 U.S. 13 10
Lawrence v. State Tax Commission, 286 U.S. 276 2
Levy Leasing Co. v. Siegel, 258 U.S. 242 18
Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 2
Lochner v. New York, 198 U.S. 45 20
Lottery Cases, 188 U.S. 321 9
Mahler v. Eby, 264 U.S. 32 18
McCray v. United States, 195 U.S. 27 3
McLean v. Arkansas, 211 U.S. 539 10
Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580 ..... 2, 3
Minnesota Rate Cases, 230 U.S. 352 18
Mountain Timber Co. v. Washington, 243 U.S. 219 9
Mugler v. Kansas, 123 U.S. 623 9
Muller v. Oregon, 208 U.S. 412 9
Murphy v. Sardell, 269 U.S. 530 15
Nebbia v. New York, 291 U.S. 502 ..... 11, 18
New York Central R.R. Co. v. White, 243 U.S. 188 9
O'Gorman & Young v. Hartford Fire Insurance Co., 282 U.S. 251 ..... 2, 10
Pacific States Box Co. v. White, 296 U.S. 176 ..... 2, 3
Pacific Telephone Co. v. Seattle, 291 U.S. 300 18

	PAGE
Patsone v. Pennsylvania, 232 U.S. 138	3
Patterson v. Bark Eudora, 190 U.S. 169	10
Riley v. Massachusetts, 232 U.S. 671	9
Rast v. Van Deman & Lewis, 240 U.S. 342	3
Sinking Fund Cases, 99 U.S. 700	2
Smith v. Cahoon, 283 U.S. 553	4
Smith v. Kansas Title Co., 255 U.S. 180	3
Smyth v. Ames, 169 U.S. 466	18
Stanton v. Embrey, 93 U.S. 548	17
Strathearn S.S. Co. v. Dillon, 252 U.S. 348	10
Tagg Bros. & Moorhead v. United States, 280 U.S. 420	10
United States v. Doremus, 249 U.S. 86	3
Virginia v. West Virginia, 238 U.S. 202	18
Watkins v. Sedberry, 261 U.S. 571	17
Weber v. Freed, 239 U.S. 325	3
Williams v. Mayor, 289 U.S. 36	2
Wilson v. New, 243 U.S. 332	3, 10
Yeiser v. Dysart, 267 U.S. 540	10

TABLE OF STATUTES CITED.

Arizona, Session Laws, 1933, ch. 3	15
Arkansas, Act 191 of General Assembly of 1915	15
Connecticut, Cumulative Supplement to the General Statutes (1931); 1933, c. 131a, Secs. 620b—683b	21
Illinois, Session Laws, 1933, p. 597-604, as amended, Session Laws, 1935, p. 840	21
Massachusetts, Session Laws, 1934, c. 308, as amended Session Laws, 1935, c. 267	21
New Hampshire, Session Laws, 1933, c. 87	21
New Jersey, Session Laws, 1933, c. 152	21
New York Laws, 1933, ch. 584	3
Rhode Island, Session Laws, 1936, p. 37	21

PAGE

OTHER AUTHORITIES.

Ames, The History of Assumpsit, 2 Harvard Law Review 17

IN THE

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No. 838.

FREDERICK L. MOREHEAD, as the Warden of the City Prison in the Borough of Brooklyn, *Petitioner*,

v.

PEOPLE *ex rel.* JOSEPH TIPALDO, *Respondent*.

BRIEF ON BEHALF OF STATES OF CONNECTICUT, ILLINOIS, MASSACHUSETTS, NEW HAMPSHIRE, NEW JERSEY AND RHODE ISLAND, AS AMICI CURIAE.

STATEMENT.

This brief is filed pursuant to special leave of Court, on behalf of the States of Connecticut, Illinois, New Hampshire, New Jersey and Rhode Island, and the Commonwealth of Massachusetts. In each of these States there has been enacted legislation substantially similar to Chapter 584 of the Laws of New York, 1933, the *prima facie* validity of which is involved in the case at bar. A list of these statutes, with the date of enactment in each case, is contained in the Appendix. In view of the substantial similarity between the New York law and these statutes, it is believed that a determination, on the present record, that the New York statute could not constitutionally be enforced under any circumstances, would materially affect their possible enforcement. For this reason these six States respectfully avail themselves of the opportunity of submitting their views for the consideration of this Court.

I.

The Existence of the Facts Underlying Constitutionality Must Be Presumed By This Court and Are Supported By Formal Legislative Findings.

One of the most striking aspects of the present case is the paucity of the record, which consists merely of a petition for *habeas corpus* and the return to the writ. This Court is thus asked to decide the constitutionality of a State statute solely upon its face, in short, to determine that under no circumstances would the action of State officials taken in conformance with its provisions be constitutionally valid.

In this state of the record, it is submitted that, apart from any invalidity appearing upon the face of the statute, the presumption of the existence of the facts underlying constitutionality must be applied. As stated in *O'Gorman & Young* v. *Hartford Fire Insurance Co.*, 282 U. S. 251, 257,

> "As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute."[1]

During the present term, the Court had occasion again to apply the rule announced in *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 209, that whenever legislative action

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[1] This rule was early applied, see *Sinking Fund Cases*, 99 U. S. 700, 718; *Close* v. *Glenwood Cemetery*, 107 U. S. 466, 475; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 79, 83; *Chicago Dock Co.* v. *Fraley*, 228 U. S. 680; and has been held controlling in many recent cases. See *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden Co.*, 284 U. S. 151, 158; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 283; *Williams* v. *Mayor*, 289 U. S. 36, 42; *Metropolitan Co.* v. *Brownell*, 294 U. S. 580, 584; *Pacific States Box Co.* v. *White*, 296 U. S. 176, 184.

> "is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary."

See *Pacific States Box Co.* v. *White*, 296 U. S. 176, 185. *Cf. Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580, 584.

In the case at bar, the usual presumption of the existence of the facts underlying legislative action under the police power, is fortified by specific legislative findings by the New York Legislature.[2] These are contained in the first section of the statute, entitled "*Factual Background*" and recite that—

> "Section 550. The employment of women and minors in trade and industry in the state of New York at wages unreasonably low and not fairly commensurate with the value of the services rendered is a matter of grave and vital public concern. Many women and minors employed for gain in the state of New York are not as a class upon a level of equality in bargaining with their employers in regard to minimum fair wage standards, and 'freedom of contract' as applied to their relations with their employers is illusory. Since a very large percentage of such

[2] Such legislative findings, formally made after investigation, certainly merit judicial acceptance. See *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157 ("if the legislature thought . . . [the evils existed] . . . we cannot review their economics or facts"); *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144; *Keokee Consolidated Coke Co.* v. *Taylor*, 234 U. S. 224, 227; *Rast* v. *Van Deman & Lewis*, 240 U. S. 342, 367 ("it was the judgment of the legislature that such practice was an impediment to the public welfare"). Compare *McCray* v. *United States*, 195 U. S. 27, 53-59; *Weber* v. *Freed*, 239 U. S. 325, 329-30; *Wilson* v. *New*, 243 U. S. 332, 358-59; *United States* v. *Doremus*, 249 U. S. 86, 93-94; *Dakota Central Tel. Co.* v. *South Dakota*, 250 U. S. 163, 187; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 161; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 210.

workers are obliged from their week to week wages to support themselves and others who are dependent upon them in whole or in part they are, by reason of their necessitous circumstances, forced to accept whatever wages are offered them. Judged by any reasonable standard, wages are in many cases fixed by chance and caprice and the wages accepted are often found to bear no relation to the fair value of the service rendered. Women and minors employed for gain are peculiarly subject to the overreaching of inefficient, harsh or ignorant employers and under unregulated competition where no adequate machinery exists for the effective regulation and maintenance of minimum fair wage standards, the standards such as exist tend to be set by the least conscionable employers. In the absence of any effective minimum fair wage rates for women and minors, the constant lowering of wages by unscrupulous employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers and threatens the stability of industry. The evils of oppressive, unreasonable and unfair wages as they affect women and minors employed in the state of New York are such as to render imperative the exercise of the police power of the state for the protection of industry and of the women and minors employed therein and of the public interest of the community at large in their health and well-being and in the prevention of the deterioration of the race. In the considered judgment of the legislature this article is constitutional."

Thus, unless in the present case it can be found from the face of the statute[3] that under no circumstances which

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[3] Compare *Smith* v. *Cahoon*, 283 U. S. 553, 557. In *Adkins* v. *Children's Hospital*, 261 U. S. 535, 550, the Court reviewed *Bunting* v. *Oregon*, 248 U. S. 426, 429, in which it had been urged that an Oregon enactment was invalid on its face, and remarked that the Oregon "statute forbidding the employment of any person . . . more than ten hours in any one day, and providing payment for overtime not exceeding three hours in any one day at the rate of time and a half of the regular wage, was sustained on the ground that, since the state legislature and State Supreme Court *had found*

could "reasonably be conceived" would its administration and enforcement be constitutionally proper, it would seem clear that all constitutional questions must be resolved in favor of the validity of the enactment. We must inquire, therefore, whether there exist on the face of the Act any constitutional defects.

II.

The Statute Is A Fair and Reasonable One and Is A Valid Exercise of the Police Power.

Perhaps the most outstanding characteristics of the New York statute are the careful limitation of its scope and the elaborate provisions which have been made at every turn for opportunity to all who are interested to be heard and to present evidence, and for the consideration and periodic reconsideration of all the facts and arguments which may be presented before, and even after, any order is issued.

The limitation of the scope of the statute appears at the very outset in the recitation of facts which the legislature has found to exist and upon which it bases its enactment. In the first section (Sec. 550) the legislature finds that the employment of women and minors in New York at wages which are both not commensurate with the value of the services performed and are unreasonably low—in the sense, as later appears, that they are insufficient to meet the minimum cost of living necessary for health—presents a matter of grave and vital public concern, which calls for an exercise of the police power of the State. It finds that this concern arises because many women and minors are not upon a level of equality in bargaining with their employers; that a large percentage of them have dependents whom they must support; that a large percentage of them are forced by their necessitous cir-

such a law necessary for the preservation of the health of employees in these industries, this Court would accept their judgment, in the absence of facts to support the contrary conclusion." (Italics ours.)

cumstances to accept whatever wages are offered; that, in many cases, these wages are fixed by chance and caprice and bear no relation to the value of the service performed; that such persons are peculiarly subject to overreaching; and that wages fixed under these circumstances constitute an unfair method of competition, and threaten other wage agreements and the stability of industry. The respondent upon this record does not question the existence of these conditions, and it is plain that the persons described, under the circumstances specified, are a proper object of the solicitude of the State, and may properly receive its protection against wage bargains below the fair value of the services given.

We turn then to what the statute provides to protect persons so situated. The Industrial Commissioner, on the petition of fifty residents of the State, shall cause an investigation to be made of the wages being paid to women or minors in any occupation, to ascertain whether any substantial number of them are receiving wages which are both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health. If he finds that any substantial number are receiving such wages, he is directed to appoint a wage board to report on the establishment for these persons of a wage fairly and reasonably commensurate with the value of the services they render.

This investigation results in no order affecting wages. It is merely a preliminary investigation to ascertain whether the State shall go further. The State will not go further, it will not appoint a wage board to report upon the fair value of the services, unless the Commissioner finds not only that the wages paid to a substantial number of women and minors in a particular industry are not commensurate with the value of their services, but

also that the wages are not sufficient to maintain such persons in health. Only in such circumstances and to protect such persons is a wage board summoned.

The wage board is composed of representatives of the employers, the employees and the public. It is convened to report upon a wage which is fairly and reasonably commensurate with the value of the service rendered. It is to take into consideration all relevant circumstances affecting the value of the services, and is to be guided by the factors which would guide a court in a suit on *quantum meruit* for the value of the services rendered. This board may subpoena witnesses and records. It may take testimony orally or by deposition. It makes its report to the Commissioner. The Commissioner may accept the report or require it to be reconsidered. If he accepts it, he is required to give notice of a public hearing at which all persons may be heard. If, after the hearing, he approves the report, he may put it into effect; but, for a period of at least nine months, it may not be made mandatory. It is only when the Commissioner finds that persistent non-observance of the order by one or more employers is threatening the maintenance of fair minimum wage standards that he may, after another public hearing, at which all persons may be heard, make the order mandatory.

Furthermore, at any time after an order has been published and in operation for one year, whether mandatory or not, the Commissioner may, and shall upon petition by fifty persons, reconvene the same wage board or appoint a new wage board to reconsider the wage fixed by the order.

This statement of the New York Act shows not only how limited, fair and reasonable it is throughout, but how scrupulously there has been excluded from it every object and method which made the statute considered by this Court in *Adkins* v. *Children's Hospital*, 261 U. S. 525,

unreasonable, and hence violative of the due process clause.

Here clearly is restraint and reasonableness and every element of due legal process. There is no attempt to interfere with the freedom of women generally to make their own contracts for wages. The State intervenes only where it is found in a particular occupation that a substantial number of women are receiving less than the value of their work, and then only where this is found to threaten their health and the stability of wage standards. The entire scope of the intervention is to determine the fair value of the services concerned and to prevent bargains—which, under the circumstances, must be closely akin to sharp practice or fraud, or, at the least, the result of ignorance—for less than value received.

A. The Establishment and Enforcement of Minimum Wages In a Particular Industry Under the Circumstances and Pursuant to the Method Prescribed in the New York Statute is Not Prima Facie Unconstitutional

At the outset, we are confronted with the suggestion that prior decisions of this Court establish the principle that *any* regulation of wages is a violation of the Fourteenth Amendment, and that because of the subject matter with which it deals the New York statute at bar is on its face necessarily unconstitutional.

This position is untenable. Liberty of contract is, of course, protected by the Fourteenth Amendment. But like other private rights it must yield when the public welfare so demands. The requirements of the due process clause are fulfilled if the end sought to be achieved is a permissible one, and if the means adopted have a substantial relation to the desired result, and are not arbitrary, capricious, or unreasonable. Within these limits an exercise of the police power is valid though as

a necessary consequence an infringement of private rights results. The extent to which this infringement may constitutionally be carried depends upon the character of the public welfare involved, and may approach absolute destruction in cases of great public interest. Compare *Lottery Cases,* 188 U. S. 321; *Mugler* v. *Kansas,* 123 U. S. 623. The contract of employment is not exceptional in this respect and regulations of its incidents both in respect to employer and employee have frequently been sustained. *Muller* v. *Oregon,* 208 U. S. 412 (maximum hours of labor of women); *Riley* v. *Mass.,* 232 U. S. 671 (same); *Bowersock* v. *Smith,* 243 U. S. 29 (working conditions); *New York Central R. R. Co.* v. *White,* 243 U. S. 188; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219 (liability for injuries arising out of employment).

It is claimed, however, that the present statute must fall as a matter of law because it contains limited provisions fixing minimum wages; and that such an interference with a single incident of the employment contract is never to be permitted, irrespective of its reasonableness or the magnitude of the public interest involved.

The Fourteenth Amendment and the cases construing it justify no such conclusion. The cases urged in its support merely held that the particular statute in question was not a proper means of achieving the desired result. They do not establish that such regulations are *prima facie* invalid. The right to contract freely with reference to wages, like other private rights, may be made to yield if the proper case be presented. In this respect each case must be disposed of on its own merits. The validity of wage regulations must be judged just as any other exercise of the police power which allegedly contravenes the due process clause.

That wages as such are not beyond the scope of legislation is clearly established by the decisions of this Court.

In *McLean* v. *Arkansas,* 211 U. S. 539, it was held that the legislature could constitutionally make it unlawful to estimate the graduated pay of miners by weight after screening the coal. In *Knoxville Iron Co.* v. *Harbison,* 183 U. S. 13, the Court sustained a requirement that store orders issued for wages must be redeemable in cash. In *Patterson* v. *Bark Eudora,* 190 U. S. 169, a law forbidding the payment of seamen's wages in advance was upheld. A similar case is *Strathearn S. S. Co.* v. *Dillon,* 252 U. S. 348. In none of these cases was the actual amount of the wages the subject of regulation, but the liberty of contract of the employer and the employee was seriously curtailed. The opinions contain no indication that the field of wages is a peculiarly sacred one.

In the case of *Wilson* v. *New,* 243 U. S. 332, the Court went a step further and sustained regulation of the very heart of the employment contract—the quantum of the wages. The unusual circumstances attending this case are conceded, but irrespective of these, the case shows that wages may properly be made the subject of legislative action if conditions so compel. Emergency is not a source of power, and *Wilson* v. *New* certainly shows that wages as such are not inviolable.

An analagous situation exists in regulations of prices charged for personal services. In *Yeiser* v. *Dysart,* 267 U. S. 540, attorney's fees were subjected to control. *O'Gorman & Young* v. *Hartford Fire Insurance Co.,* 282 U. S. 251, permitted regulation of the commissions of insurance agents, and in *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, the commissions of persons operating as "market agencies" at stockyards were accorded like treatment.

Thus in the field of wages, as in any other field, liberty of contract is subservient to the police power, and wages, as such, are not exempt from regulation. That the ap-

plication of this principle is not limited to public utilities or so-called businesses "affected with a public interest" is shown by the recent decision of *Nebbia* v. *New York*, 291 U. S. 502, upholding the validity of New York's Milk Control Act which contained provisions regulating the price to be charged for milk. There, as here, the contention was made that price regulation may be justified only when the business partakes of the character of a public utility. This the Court squarely rejected.

Speaking through Mr. Justice Roberts, the Court disposed of the contention that prices were immune from regulation (p. 531):

> "But we are told that because the law essays to control prices it denies due process. Notwithstanding the admitted power to correct existing economic ills by appropriate regulation of business, even though an indirect result may be a restriction of the freedom of contract or a modification of charges for services or the price of commodities, the appellant urges that direct fixation of prices is a type of regulation absolutely forbidden. His position is that the Fourteenth Amendment requires us to hold the challenged statute void for this reason alone. The argument runs that the public control of rates or prices is per se unreasonable and unconstitutional, save as applied to businesses affected with a public interest; that a business so affected is one in which property is devoted to an enterprise of a sort which the public itself might appropriately undertake, or one whose owner relies on a public grant or franchise for the right to conduct the business, or in which he is bound to serve all who apply; in short, such as is commonly called a public utility; or a business in its nature a monopoly. The milk industry, it is said, possesses none of these characteristics, and, therefore, not being affected with a public interest, its charges may not be controlled by the state. Upon the soundness of this contention the appellant's case against the statute depends.

"We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. We think the appellant is also right in asserting that there is in this case no suggestion of any monopoly or monopolistic practice. It goes without saying that those engaged in the business are in no way dependent upon public grants or franchises for the privilege of conducting their activities. But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago."

Mr. Justice Roberts then reviewed cases in which price regulation had been sustained in purely private enterprises (page 535):

"Many other decisions show that the private character of a business does not necessarily remove it from the realm of regulation of charges or prices. The usury laws fix the price which may be exacted for the use of money, although no business more essentially private in character can be imagined than that of loaning one's personal funds. Griffith v. Connecticut, 218 U. S. 563. Insurance agents' compensation may be regulated, though their contracts are private, because the business of insurance is considered one properly subject to public control. O'Gorman & Young v. Hartford Fire Ins. Co., 282 U. S. 251. Statutes prescribing in the public interest the amounts to be charged by attorneys for prosecuting certain claims, a matter ordinarily one of personal

> and private nature, are not a deprivation of due process. Frisbie v. United States, 157 U. S. 160; Capital Trust Co. v. Calhoun, 250 U. S. 208; Calhoun v. Massie, 253 U. S. 170; Newman v. Moyers, 253 U. S. 182; Yeiser v. Dysart, 267 U. S. 540; Margolin v. United States, 269 U. S. 93. A stockyards corporation, 'while not a common carrier, nor engaged in any distinctively public employment, is doing a work in which the public has an interest,' and its charges may be controlled. Cotting v. Kansas City Stockyards Co., 183 U. S. 79, 85. Private contract carriers, who do not operate under a franchise, and have no monopoly of the carriage of goods or passengers, may, since they use the highways to compete with railroads, be compelled to charge rates not lower than those of public carriers for corresponding services, if the state, in pursuance of a public policy to protect the latter, so determined. Stephenson v. Binford, 287 U. S. 251, 274."

and concluded that—

> "there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."

The *Nebbia* case thus disposes of the contention that prices may be regulated only when the business is "affected with a public interest." This touchstone is a wholly illusory one and means only that a business may be regulated when the public welfare so demands. The fact that in the past conditions have not been deemed sufficient to constitute the requisite public interest does not mean that they may not in the future. Mr. Justice Roberts demonstrated this clearly in the *Nebbia* case when he said (page 536):

> "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and

> Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. . . . *The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good.*" (Italics ours.)

The principal case relied on by those questioning the validity of the statute at bar is *Adkins* v. *Children's Hospital*, 261 U. S. 525, which held invalid an Act of Congress containing provisions for the establishment of minimum wages for women in the District of Columbia. The opinion in this case discloses no indication that such a statute is necessarily unconstitutional. On the contrary, it recognizes the principles contended for here, and reaffirms that liberty of contract is not absolute. The Court stated that (p. 546):

> "There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints."

The decision was concerned only with the particular statute there in question, and a considerable portion of the opinion is devoted to a review of the decisions of this Court upholding legislation imposing restraints upon the making of contracts of employment. The Court found the principal vice in the District of Columbia statute before it, to be the establishment of a minimum based solely on estimates of the cost of living, and having no relation to the value of the services rendered.

Such provisions, the Court held, were not a proper exercise of the police power, but it is difficult to see how this decision controls the validity of the New York statute. Indeed, the Court in the *Adkins* case stated that under the proper circumstances a reasonable statute might be upheld (page 559):

> "A statute requiring an employer to pay . . . the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable."

Other decisions of this Court concerning minimum wage laws rested upon like grounds. In *Murphy* v. *Sardell*, 269 U. S. 530, the Arizona statute fixed a flat rate of $16.00 per week (Arizona Session Laws, 1933, ch. 3), and in *Donham* v. *West-Nelson Manufacturing Co.*, 273 U. S. 657, the Arkansas statute set a per diem rate of $1.25 subject to revision upwards by the Industrial Welfare Commission (Act 191 of Arkansas General Assembly of 1915). These statutes were subject to the same criticism as that in the *Adkins* case, and there is nothing in the cases to indicate that wages may not be regulated if the statute be a reasonable one.

This review of the cases leads to but one conclusion. The statute at bar is not *prima facie* unconstitutional merely because it regulates wages. As this Court said through Mr. Justice Roberts in the *Nebbia* case (p. 539):

> "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."

B. The New York Statute Differs Radically from that Considered by this Court in the Adkins Case.

We have already pointed out that the New York statute is limited to establishing a method—replete with opportunities for hearings, presentation of evidence, the making of findings, the opening and reconsidering of orders, in fact, all the elements of deliberate legal process—for preventing the making of hard and unfair bargainings between employers and a limited class of women employed in industry, whom the legislature has found to be unable

to protect themselves against these practices, and then only in circumstances in which the legislature has found that the consequences of these bargains threaten wage standards and the stability of industry. It remains briefly to indicate the radical difference between this statute and that which this Court found in *Adkins* v. *Children's Hospital, supra,* to violate the due process clause.

The wage which the employer was called upon to pay in the *Adkins* case was one which must be adequate to supply the necessary cost of living to women workers in that occupation and to maintain them in health and to protect their morals. This Court pointed out not only the impossibility of applying a standard so vague and general, but that it offended more basicly. It bore no relation whatever, and was not required to bear any relation, to the fair value of the services rendered, or even to the benefit which the employer obtained from the services. It was thus unreasonable and arbitrary in exacting from the employer a payment based solely upon the supposed needs of the employee and not in any way measured by the value of what the employer received.

It has already been made clear that under the New York statute the only wage standard which may be put into effect is one fairly and reasonably commensurate with the value of the services rendered. Under this statute no one may be required to pay more than the value of what was received. This minimum value is only determined when it has been found that the payment of less to persons without power to protect themselves threatens injury to vital interests of the State. Surely the Fourteenth Amendment does not confer a right to pay less than the value of what is received, when to do so injures interests of the State in the health of its people and the stability of its industry.

It is charged that the standard of "fair wage" pro-

vided by the statute lacks definiteness. This charge we shall show below is not properly before the Court, in view of the provisions of the statute designed to give the standard mathematical definiteness in any particular case. We submit, however, that the contention is without merit and that the standard of "a wage fairly and reasonably commensurate with the value of the service, or class of service, rendered" meets all the constitutional requirements. The standard of "fair and reasonable value of the services rendered" is a standard long known to the common law. Since the advent of the right of recovery on a *quantum meruit* in the early seventeenth century (see Ames, The History of Assumpsit, 2 Harvard Law Review 1, 58), the recovery has been the "reasonable value of the services rendered," and this Court has recognized such to be the rule. *Stanton* v. *Embrey*, 93 U. S. 548, 557; *Clark* v. *United States*, 95 U. S. 539, 542; *Goddard* v. *Foster*, 17 Wall. 123; *Delaware City, etc. Nav. Co.* v. *Reybold*, 142 U. S. 636; *Watkins* v. *Sedberry*, 261 U. S. 571, 575. Nor have the courts found this standard inapplicable or impracticable even when the services are unique in character. In such a case it is sufficient to show the value of the "same class of services in some respects, although not to the same extent or possessed of the same characteristics" as those performed by the plaintiff. *Gall* v. *Gall*, 27 App. Div. (N. Y.) 173, 177. One is at a loss to perceive why the wage boards provided for in the present act cannot proceed in a similar manner. Under the act, it is not sought to fix the value of the services of any class or group or sub-group of employees, as a whole, but only that of the least valuable workers therein. Who these are, in any given case, and how much their services are reasonably worth, are questions that present no unique or insuperable difficulty.

Furthermore, the requirement of definiteness of stand-

ard is by no means so strict, as a measure of administrative guidance, as in statutes laying down a rule of conduct, *Mahler* v. *Eby*, 264 U. S. 32, 41, which the citizen must interpret and apply for himself. "Fair value" itself, estimated on the broadest possible grounds, and apart from market value, has been accepted for decades as a proper administrative standard in fixing railroad and other public utility rates, *Smyth* v. *Ames*, 169 U. S. 466, 547; *Minnesota Rate Cases*, 230 U. S. 352, 434-5; as well as in estimating the basis of taxation and just compensation in eminent domain. *Great Northern R. Co.* v. *Weeks*, U. S. Sup. Ct., Feb. 3, 1926. This Court has held that "fair value" can be determined when there is no sufficient proof of market value. *Virginia* v. *West Virginia*, 38 U. S. 202, 213. It has upheld standards such as that of "just and reasonable rents", *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242, 249; and permitted prices to be fixed on the basis of a "reasonable return" to the producer, *Nebbia* v. *New York*, 291 U. S. 502; and "a just and reasonable profit", *Highland* v. *Russell Car Co.*, 279 U. S. 253. Originally, the court sustained the power of the Interstate Commerce Commission to fix rates merely on the basis of "reasonableness", without, at first, even a specific statutory requirement of a reasonable return on fair value. Indefinable terms of relatively vague import, such as "unfair methods of competition", have been given more definite context by the "gradual process of judicial inclusion and exclusion." *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 648. See also *Pacific Telephone Co.* v. *Seattle*, 291 U. S. 300, 303-4, and cases therein cited.

The present statute does not require the employer to determine for himself what a minimum fair wage shall be, with penalty for violation, but imposes the duty upon the officials charged with the administration of the stat-

ute. When the time for compliance with a wage order arrives, the duty of the employer is not only "reasonably clear", but entirely definite.

Finally, in the *Adkins* case, the Court decided that the Constitutional right of women to liberty of contract could not be impaired by preventing them from working for wages which a Board found were insufficient to maintain them in health or to protect their morals. In the present statute no such attempt is made. The statute concerns itself only with the protection of limited groups of women, found to be peculiarly subject to oppression and lacking the very fundamentals of freedom of contract, against agreements closely akin to fraud or sharp practice. Liberty of contract cannot begin until the door has been closed to overreaching and hard bargains forced upon the necessitous and those ignorant of the value of their work.

The scrupulous regard for the requirements of due process evidenced on the face of the New York act and its specific limitation to the particular groups found by the legislature to require protection in the public interest, comports with the oft repeated statements of this Court that the scope of the police power is dependent upon existent, concrete facts and not upon abstract theory. It does not in the least follow that because it is constitutional for the state to afford a minimum measure of protection to an exceptionally vulnerable and limited group, by assuring to them the value of what they give, it can therefore interfere with the wage contracts of other groups or regulate the broad field of wages generally. Any contention that because the legislature can interest itself in the wage contracts of some women, it can therefore regulate the wage contracts of all men or all women, is a complete *non-sequitur*. To cite a familiar example, regulation of hours of labor has been sustained for a group of

men held to require special protection (*Holden* v. *Hardy*, 169 U. S. 366), even though the Court reached quite a different determination as to a different group of men under different circumstances. *Lochner* v. *New York*, 198 U. S. 45. Similarly, how far the legislature can go in dealing with the wage contracts of other persons will depend, not upon the decision here, but upon the concrete facts of particular cases as they may arise. The police power of the states as outlined by the decisions of this Court is conceived in dynamic realism where the most vital differences are differences of degree.

Respectfully submitted,

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APPENDIX.

Statutes of Connecticut, Illinois, Massachusetts, New Hampshire, New Jersey, and Rhode Island Substantially Similar to the New York Law.

Connecticut: Cumulative Supplement to the General Statutes, 1933, c. 131a, Secs. 620b-633b.

Illinois: Act of July 6, 1933, Session Laws, 1933, p. 597-604, as amended by Act of July 2, 1935, Session Laws, 1935, p. 840 .

Massachusetts: Act of June 13, 1934, Session Laws, 1934, c. 308, as amended by the Act of May 17, 1935, Session Laws, 1935, c. 267.

New Hampshire: Act of April 26, 1933, Session Laws, 1933, c. 87.

New Jersey: Act of May 8, 1933, Session Laws, 1933, c. 152.

Rhode Island: Act of March 4, 1936, Session Laws, 1936, p. 37.

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 838.—October Term, 1935.

Frederick L. Morehead, as Warden of the City Prison of the Borough of Brooklyn, Petitioner,
vs.
People *ex rel.* Joseph Tipaldo.

On Writ of Certiorari to the Supreme Court of the State of New York.

[June 1, 1936.]

Mr. Justice Butler delivered the opinion of the Court.

This is a habeas corpus case originating in the supreme court of New York. Relator was indicted in the county court of Kings county and sent to jail to await trial upon the charge that as manager of a laundry he failed to obey the mandatory order of the state industrial commissioner prescribing minimum wages for women employees.

The relator's petition for the writ avers that the statute, c. 584 of the Laws of 1933 (Cons. Law, c. 31, art. 19) under which the commissioner made the order, insofar as it purports to authorize him to fix women's wages, is repugnant to the due process clause, Art. I, § 6, of the constitution of the State and the due process clause of the Fourteenth Amendment to the constitution of the United States. The application for the writ is grounded upon the claim that the state statute is substantially identical with the minimum wage law enacted by Congress for the District of Columbia, 40 Stat. 960, which in 1923 was condemned by this court as repugnant to the due process clause of the Fifth Amendment. *Adkins* v. *Children's Hospital*, 261 U. S. 525.

The warden's return, without disclosing the commissioner's order, the prescribed wages, the findings essential to his jurisdiction to establish them, things done in pursuance of the Act, or the allegations of the indictment, merely shows that under an order of the county court he was detaining relator for trial. The case was submitted on petition and return. The court dismissed the writ. 156 Misc. 522. Relator took the case to the Court of Appeals. It held

the Act repugnant to the due process clauses of the state and federal constitutions. 270 N. Y. 233. The remittitur directed that the order appealed from be reversed, the writ sustained and the prisoner discharged; it certified that the federal constitutional question was presented and necessarily passed on. The supreme court entered judgment as directed. We granted a writ of certiorari. — U. S. —

The Act extends to women and minors in any "occupation" which "shall mean an industry, trade or business or branch thereof or class of work therein in which women or minors are gainfully employed, but shall not include domestic service in the home of the employer or labor on a farm". § 551 (6). It is not an emergency law. It does not regulate hours or any conditions affecting safety or protection of employees. It relates only to wages of adult women and minors. As the record is barren of details in respect of investigation, findings, amounts being paid women workers in laundries or elsewhere prior to the order, or of things done to ascertain the minimum prescribed, we must take it as granted that, if the State is permitted as against employers and their women employees to establish and enforce minimum wages, that power has been validly exerted. It is to be assumed that the rates have been fairly made in accordance with the procedure prescribed by the Act and in full compliance with the defined standards. If, consistently with the due process clause, the State may not enter upon regulation of the sort undertaken by the challenged enactment, then plainly it cannot by diligence to insure the establishment of just minima create power to enter that field. Cf. *St. Joseph Stock Yards Co.* v. *United States*, — U. S. —, — (pamphlet, p. 6). *Baltimore & Ohio R. R.* v. *United States*, — U. S. —, — (pamphlet, pp. 13-14).

The *Adkins* case, unless distinguishable, requires affirmance of the judgment below. The petition for the writ sought review upon the ground that this case is distinguishable from that one. No application has been made for reconsideration of the constitutional question there decided.[1] The validity of the principles upon which that decision rests are not challenged. This court confines itself

[1] Briefs amici curiae in support of the application were filed by the City of New York and the State of Illinois. Briefs on the merits supporting the New York Act, were filed by the State of Ohio, and by the States of Connecticut, Illinois, Massachusetts, New Hampshire, New Jersey and Rhode Island. Briefs for affirmance were filed by the New York State Hotel Association, National Woman's Party, National Association of Women Lawyers, et al.

to the ground upon which the writ was asked or granted. *Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240, 242. *Clark* v. *Williard*, 294 U. S. 211, 216. Here the review granted was no broader than that sought by the petitioner. *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, 494. He is not entitled and does not ask to be heard upon the question whether the *Adkins* case should be overruled. He maintains that it may be distinguished on the ground that the statutes are vitally dissimilar.

The District of Columbia Act provided for a board to ascertain and declare "standards of minimum wages" for women in any occupation and what wages were "inadequate to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals." § 9. Violations were punishable by fine and imprisonment. § 18. The declared purposes were to protect women from conditions detrimental to their health and morals, resulting from wages inadequate to maintain decent standards of living. § 23.

The New York Act declares it to be against public policy for any employer to employ any woman at an oppressive and unreasonable wage (§ 552) defined as one which is "both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health". § 551 (7). "A fair wage" is one "fairly and reasonably commensurate with the value of the service or class of service rendered". § 551 (8). If the commissioner is of opinion that any substantial number of women in any occupation are receiving oppressive and unreasonable wages he shall appoint a wage board to report upon the establishment of minimum fair wage rates. § 554. After investigation, the board shall submit a report including its recommendations as to minimum fair wage standards. § 555.

And for administrative guidance, the Act declares: "In establishing a minimum fair wage for any service or class of service under this article the commissioner and the wage board without being bound by any technical rules of evidence or procedure (1) may take into account all relevant circumstances affecting the value of the service or class of service rendered, and (2) may be guided by like considerations as would guide a court in a suit for the reasonable value of services rendered where services are rendered at the request of an employer without contract as to the amount of

the wage to be paid, and (3) may consider the wages paid in the state for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards". § 551 (8)

If the commissioner accepts the report, he shall publish it and a public hearing must be held. § 556. If after the hearing he approves the report, he "shall make a directory order which shall define minimum fair wage rates". § 557. Upon hearing and finding of disobedience the commissioner may publish the name of an employer as having failed to observe the directory order. § 559. If, after a directory order has been in effect for nine months, the commissioner is of opinion that persistent non-observance is a threat to the maintenance of the prescribed standards, he may after hearing make the order mandatory. § 560. Violation of a mandatory order is a misdemeanor punishable by fine, imprisonment or both. § 565 (2).

Thus it appears: The minimum wage provided for in the District Act was one not less than adequate "to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals". The New York Act defines an oppressive and unreasonable wage as containing two elements. The one first mentioned is: "less than the fair and reasonable value of the services rendered". The other is: "less than sufficient to meet the minimum cost of living necessary for health". The basis last mentioned is not to be distinguished from the living wage defined in the District act. The exertion of the granted power to prescribe minimum wages is by the State act conditioned upon a finding by the commissioner or other administrative agency that a substantial number of women in any occupation are receiving wages that are oppressive and unreasonable, i.e., less than value of the service and less than a living wage. That finding is essential to jurisdiction of the commissioner. In the state court there was controversy between the parties as to whether the "minimum fair wage rates" are required to be established solely upon value of service or upon that value and the living wage. Against the contention of the attorney general, the Court of Appeals held that the minimum wage must be based on both elements.

Speaking through its chief judge, that court said: "We find no material difference between the act of Congress and this act of the New York State Legislature. The act of Congress, it is said, was to protect women from conditions resulting from wages which were

inadequate to maintain decent standards of living". The opinion then quotes from the brief of the attorney general: " 'The purpose of the statute in the *Adkins* case was to guarantee a wage based solely upon the necessities of the workers. The statute did not provide for the wages to have any relationship to earning power; was applicable to all vocations and not to the character of the work . . . As contrasted with this statute, the New York Minimum Wage Law provides a definite standard for wages paid. It provides that the worker is to be paid at least the value of the services rendered' ". The opinion continues: "This is a difference in phraseology and not in principle. The New York act, as above stated, prohibits an oppressive and unreasonable wage, which means *both* less than the fair and reasonable value of the services rendered *and* less than sufficient to meet the minimum cost of living necessary for health. The act of Congress had one standard, the living wage; this State act has added another, reasonable value. The minimum wage must include both. What was vague before has not been made any clearer. One of the elements, therefore, in fixing the fair wage is the very matter which was the basis of the congressional act. Forcing the payment of wages at a reasonable value does not make inapplicable the principle and ruling of the *Adkins* case. The distinctions between this case and the *Adkins* case are differences in details, methods and time; the exercise of legislative power to fix wages in any employment is the same".

The petitioner does not suggest and reasonably it cannot be thought that, so far as concerns repugnancy to the due process clause, there is any difference between the minimum wage law for the District of Columbia and the clause of the New York Act, "less than sufficient to meet the minimum cost of living necessary for health". Petitioner does not claim that element was validated by including with it the other ingredient, "less than the fair and reasonable value of the services rendered".

His brief repeats the state court's declaration: " 'The act of Congress had one standard, the living wage; this State act has added another, reasonable value. *The minimum wage must include both.* What was vague before has not been made any clearer. *One of the elements, therefore, in fixing the fair wage is the very matter which was the basis of the congressional act'.*" Then he says: "The italicized lines carry the Court's misconception of the

statute. It is a basic misconception. From it flows the erroneous conclusion of the Court of Appeals that there exists no material difference between the two statutes . . . Those two factors *do not* enter into the determination of the minimum '*fair wage*' as in the statute defined, nor as determined in this case. The only basis for evaluating and arriving at the 'fair minimum wage' is the fair value of the services rendered".

There is no blinking the fact that the state court construed the prescribed standard to include cost of living or that petitioner here refuses to accept that construction. Petitioner's contention that the Court of Appeals misconstrued the Act cannot be entertained. This court is without power to put a different construction upon the state enactment from that adopted by the highest court of the State. We are not at liberty to consider petitioner's argument based on the construction repudiated by that court. The meaning of the statute as fixed by its decision must be accepted here as if the meaning had been specifically expressed in the enactment. *Knights of Pythias* v. *Meyer*, 265 U. S. 30, 32. Exclusive authority to enact carries with it final authority to say what the measure means. *Jones* v. *Prairie Oil Co.*, 273 U. S. 195, 200. The standard of "minimum fair wage rates" for women workers to be prescribed must be considered as if both elements—value of service and living wage—were embodied in the statutory definition itself. *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 220. As our construction of an Act of Congress must be deemed by state courts to be the law of the United States, so this New York Act as construed by her court of last resort, must here be taken to express the intention and purpose of her lawmakers. *Green* v. *Lessee of Neal*, 6 Pet. 291, 295-298.

The state court rightly held that the *Adkins* case controls this one and requires that relator be discharged upon the ground that the legislation under which he was indicted and imprisoned is repugnant to the due process clause of the Fourteenth Amendment.

The general statement in the New York Act of the fields of labor it includes, taken in connection with the work not covered, indicates legislative intention to reach nearly all private employers of women. The Act does not extend to men. It does extend to boys and girls under the age of 21 years but there is here involved no question as to its validity in respect of wages to be prescribed for them.

Relator's petition for the writ shows that the charge against him is that as manager of a laundry he "disobeyed a mandatory order prescribing certain minimum wages for certain adult women employees of the said laundry". The rights of no other class of workers are here involved.

Upon the face of the act the question arises whether the State may impose upon the employers state-made minimum wage rates for all competent experienced women workers whom they may have in their service. That question involves another one. It is: Whether the State has power similarly to subject to state-made wages all adult women employed in trade, industry or business, other than house and farm work. These were the questions decided in the *Adkins* case. So far at least as concerns the validity of the enactment under consideration, the restraint imposed by the due process clause of the Fourteenth Amendment upon legislative power of the State is the same as that imposed by the corresponding provision of the Fifth Amendment upon the legislative power of the United States.

This court's opinion shows (pp. 545, 546): The right to make contracts about one's affairs is a part of the liberty protected by the due process clause. Within this liberty are provisions of contracts between employer and employee fixing the wages to be paid. In making contracts of employment, generally speaking, the parties have equal right to obtain from each other the best terms they can by private bargaining. Legislative abridgement of that freedom can only be justified by the existence of exceptional circumstances. Freedom of contract is the general rule and restraint the exception. This court has found not repugnant to the due process clause statutes fixing rates and charges to be exacted by businesses impressed with a public interest, relating to contracts for the performance of public work, prescribing the character, methods and time of payment of wages, fixing hours of labor. Physical differences between men and women must be recognized in proper cases and legislation fixing hours or conditions of work may properly take them into account, but (p. 553) "we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the impli-

cations to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships. . . . [p. 554] Enough has been said to show that the authority to fix hours of labor cannot be exercised except in respect of those occupations where work of long continued duration is detrimental to health. This Court has been careful in every case where the question has been raised, to place its decision upon this limited authority of the legislature to regulate hours of labor and to disclaim any purpose to uphold the legislation as fixing wages, thus recognizing an essential difference between the two. It seems plain that these decisions afford no real support for any form of law establishing minimum wages."

The decision and the reasoning upon which it rests clearly show that the State is without power by any form of legislation to prohibit, change or nullify contracts between employers and adult women workers as to the amount of wages to be paid.

Then, the opinion emphasizes objections specifically applicable to the requirement that the minimum wages to be prescribed under the District Act shall be adequate "to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals". Some of them were: The price fixed by the board need have no relation to earning powers, hours or place or character of work; it is based wholly on opinion of the board as to what amount will be necessary to comply with the standard; it applies to every occupation without regard to the kind of work; the standard is so vague as to be impossible of practical application; the Act takes account of the necessities of only the employee; to the extent that the sum fixed exceeds fair value of service rendered, it amounts to a compulsory exaction for the support of a partially indigent person for whose condition there rests upon the employer no peculiar responsibility; the statute exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business or the contract or the work the employee engages to do; the declared basis is not the value of the service rendered but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals. The court said: The

ethical right of every worker, man or woman, to have a living wage may be conceded. The fallacy of the proposed method of attaining it is that it assumes that every employer is bound at all events to furnish it. The moral requirement, implicit in every contract of employment, viz., that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. The necessities of the employee are alone considered and these arise outside of the employment and are as great in one occupation as in another.

Illustrating particular constitutional difficulties encountered by the enactment then before us, the opinion proceeds (p. 559): "Should a statute undertake to vest in a commission power to determine the quantity of food necessary for individual support and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed. The argument in support of that now being considered is equally fallacious, though the weakness of it may not be so plain. A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things, and solely with relation to circumstances apart from the contract of employment, the business affected by it, and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States".

Petitioner does not attempt to support the Act as construed by the state court. His claim is that it is to be tested here as if it did not include the cost of living and as if value of service was the sole standard. Plainly that position is untenable. If the State has power to single out for regulation the amount of wages to be paid women, the value of their services would be a material consideration. But that fact has no relevancy upon the question whether the State has any such power. And utterly without significance upon the question of power is the suggestion that the New York prescribed standard includes value of service with cost of living

whereas the District of Columbia standard was based upon the latter alone. As shown above, the dominant issue in the *Adkins* case was whether Congress had power to establish minimum wages for adult women workers in the District of Columbia. The opinion directly answers in the negative. The ruling that defects in the prescribed standard stamped that Act as arbitrary and invalid was an additional ground of subordinate consequence.

The dissenting opinion of Mr. Chief Justice Taft (in which Mr. Justice Sanford concurred) assumes (p. 564) "that the conclusion in this [*Adkins*] case rests on the distinction between a minimum of wages and a maximum of hours." That is the only point he discussed; he did not refer to the validity of the standard prescribed by the Act. The dissenting opinion of Mr. Justice Holmes begins (p. 567): "The question in this case is the broad one, Whether Congress can establish minimum rates of wages for women in the District of Columbia with due provision for special circumstances, or whether we must say that Congress has no power to meddle with the matter at all." And, after assuming that women would not be employed at the wages fixed unless they were earned or unless the employer could pay them, the opinion says (p. 570): "But the ground on which the law is held to fail is fundamental and therefore it is unnecessary to consider matters of detail". If the decision of the court turned upon the question of the validity of the particular standard, that question could not have been ignored by the justices who were in favor of upholding the Act. Clearly they understood —and rightly—that, by the opinion of the court, it was held that Congress was without power to deal with the subject at all.

To distinguish this from the *Adkins* case, petitioner refers to changes in conditions that have come since that decision, cites great increase during recent years in the number of women wage earners and invokes the first section of the Act, called "Factual background".

The Act is not to meet an emergency; it discloses a permanent policy; the increasing number of women workers suggests that more and more they are getting and holding jobs that otherwise would belong to men. The "Factual background" must be read in the light of the circumstances attending its enactment. The New York legislature passed two minimum wage measures and contemporaneously submitted them to the governor. One was approved;

it is the Act now before us. The other was vetoed and did not become law. They contained the same definitions of oppressive wage and fair wage and in general provided the same machinery and procedure culminating in fixing minimum wages by directory orders. The one vetoed was for an emergency; it extended to men as well as to women employees; it did not provide for the enforcement of wages by mandatory orders.

It is significant that their "factual backgrounds" are much alike. They are indicated in the margin.[2] These legislative declarations, in form of findings or recitals of fact, serve well to illustrate why any measure that deprives employers and adult women of freedom to agree upon wages, leaving employers and men employees free so to do, is necessarily arbitrary. Much, if not all that in them is said in justification of the regulations that the Act imposes in respect of women's wages apply with equal force in support of the same regulation of men's wages. While men are left free to fix their wages by agreement with employers, it would be fanciful to suppose that the regulation of women's wages would be useful

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[2] Omitting the words in brackets, the following is the factual background in the first section of the Act before us. Adding the words in brackets and omitting those in italics, there is indicated the background in the bill that was not approved.

"The employment of [men and] women and minors in trade and industry in the state of New York at wages unreasonably low and not fairly commensurate with the value of the services rendered is a matter of grave and vital public concern. Many [men and] women and minors employed for gain in the state of New York are not as a class upon a level of equality in bargaining with their employers in regard to minimum [fair] wage standards, and 'freedom of contract' as applied to their relations with their employers is illusory. Since a very large percentage of such workers are obliged from their week to week wages to support themselves and others who are dependent upon them in whole or in part they are, by reason of their necessitous circumstances, forced to accept whatever wages are offered them. Judged by any reasonable standard, wages are in many cases fixed by chance and caprice and the wages accepted are often found to bear no relation to the fair value of the service rendered. *Women and minors employed for gain are peculiarly subject to the overreaching of inefficient, harsh or ignorant employers and under unregulated competition where no adequate machinery exists for the effective regulation and maintenance of minimum fair wage standards.* [and] the standards such as exist tend to be set by the least conscionable employers. In the absence of any effective minimum fair wage rates *for women and minors*, the constant lowering of wages by unscrupulous employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of *the workers* [a large proportion of the population of the state] and threatens the stability of industry. The evils of oppressive, unreasonable and unfair wages *as they affect women and minors employed in the state of New York* are such as to render imperative the exercise of the police power of the state for the protection of industry and of the [men and] women and minors employed therein and of the public interest of the community at large in their health and well being and in the prevention of the deterioration of the race. *In the considered judgment of the legislature this article is constitutional.*

to prevent or lessen the evils listed in the first section of the Act. Men in need of work are as likely as women to accept the low wages offered by unscrupulous employers. Men in greater number than women support themselves and dependents and because of need will work for whatever wages they can get and that without regard to the value of the service and even though the pay is less than minima prescribed in accordance with this Act. It is plain that, under circumstances such as those portrayed in the "Factual background", prescribing of minimum wages for women alone would unreasonably restrain them in competition with men and tend arbitrarily to deprive them of employment and a fair chance to find work.

This court, on the authority of the *Adkins* case and with the acquiescence of all the justices who dissented from the decision,[3] held repugnant to the due process clause of the Fourteenth Amendment statutes of Arizona and Arkansas,[4] respectively, fixing minimum wages for women. *Murphy* v. *Sardell*, 269 U. S. 530. *Donham* v. *West-Nelson Mfg. Co.*, 273 U. S. 657. We have adhered to the principle there applied and cited it as a guide in other cases. *Meyer* v. *Nebraska*, 262 U. S. 390, 399. *Wolff Co.* v. *Industrial Court*, 262 U. S. 522, 534. *Ribnik* v. *McBride*, 277 U. S. 350, 356. See *Near* v. *Minnesota*, 283 U. S. 697, 707-708. States having similar enactments have construed it to prevent the fixing of wages for adult women. *Topeka Laundry Co.* v. *Court of Industrial Relations*, 119 Kan. 12. *Stevenson* v. *St. Clair*, 161 Minn. 444. See *Folding Furniture Works* v. *Industrial Commission*, 300 Fed. 991. *People* v. *Successors of Laurnaga & Co.*, 32 P. R. 766.

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[3] Mr. Justice Brandeis took no part in the consideration of the *Adkins* case, He noted dissent without more in the Arizona case and Arkansas case.

[4] The Arizona Act declared: "No person . . . shall employ any female in any store, office, shop, restaurant, dining room, hotel, rooming house, laundry or manufacturing establishment at a weekly wage of less than Sixteen Dollars ($16.00) per week; a lesser amount being hereby declared inadequate to supply the necessary cost of living to any such female, to maintain her health, and to provide her with the common necessaries of life". Laws of Arizona, 1923, c. 3, § 1.

The Arkansas Act declared: "It shall be unlawful for any employer . . . to pay any female worker in any establishment or occupation less than the wage specified in this section, to-wit, except as hereinafter provided: "All female workers who have had six months' practicable experience in any line of industry or labor shall be paid not less than one dollar and twenty-five cents per day. The minimum wage for inexperienced female workers who have not had six months experience in any line of industry or labor shall be paid not less than one dollar per day". § 7108, Crawford & Moses Digest.

The New York court's decision conforms to ours in the *Adkins* case, and the later rulings that we have made on the authority of that case. That decision was deliberately made upon careful consideration of the oral arguments and briefs of the respective parties and also of briefs submitted on behalf of States and others as amici curiae. In the Arizona case the attorney general sought to distinguish the District of Columbia Act from the legislation then before us and insisted that the latter was a valid exertion of the police power of the State. Counsel for the California commission submitted a brief amicus curiae in which he elaborately argued that our decision in the *Adkins* case was erroneous and ought to be overruled. In the Arkansas case the state officers, appellants there, by painstaking and thorough brief presented arguments in favor of the same contention. But this court, after thoughtful attention to all that was suggested against that decision, adhered to it as sound. And in each case, being clearly of opinion that no discussion was required to show that, having regard to the principles applied in the *Adkins* case, the state legislation fixing wages for women was repugnant to the due process clause of the Fourteenth Amendment, we so held and upon the authority of that case affirmed per curiam the decree enjoining its enforcement. It is equally plain that the judgment in the case now before us must also be affirmed.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 838.—October Term, 1935.

Frederick L. Morehead, as Warden of the City Prison of the Borough of Brooklyn, Petitioner,
vs.
People *ex rel.* Joseph Tipaldo.

On Writ of Certiorari to the Supreme Court of the State of New York.

[June 1, 1936.]

Mr. Chief Justice Hughes, dissenting.

I am unable to concur in the opinion in this case. In view of the difference between the statutes involved, I cannot agree that the case should be regarded as controlled by *Adkins* v. *Children's Hospital*, 261 U. S. 525. And I can find nothing in the Federal Constitution which denies to the State the power to protect women from being exploited by overreaching employers through the refusal of a fair wage as defined in the New York statute and ascertained in a reasonable manner by competent authority.

First.—Relator in his petition for *habeas corpus* raises no question as to the fairness of the minimum wage he was required to pay. He does not challenge the regularity of the proceedings by which the amount of that wage was determined. We must assume that none of the safeguards of the statute was ignored and that its provisions for careful and deliberate procedure were followed in all respects. It is important at the outset to note the requirements of that procedure, as they at once dispose of any question of arbitrary procedural action.

The statute states its objectives. It defines an "oppressive and unreasonable wage" as one which "is both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health". It defines a "fair wage" as one "fairly and reasonably commensurate with the value of the service or class of service rendered." It relates to an industry, trade or business, other than domestic service or labor on a farm. The industrial commissioner is authorized to investigate and ascertain the wages of women and minors. If he is of the opinion that any substantial number of women or minors are

receiving "oppressive and unreasonable" wages, he must appoint a wage board to make report. That board is to be composed of not more than three representatives of employers, an equal number of representatives of employees, and not more than three disinterested persons representing the public. The wage board is fully equipped with authority to conduct a comprehensive investigation. It may differentiate and classify employments in any occupation according to the nature of the service rendered. It may recommend minimum fair wage rates varying with localities. It may recommend a suitable scale of rates for learners and apprentices which may be less than those recommended for experienced women or minor workers. The wage board may take into account all relevant circumstances affecting the value of the service or class of service. It may be guided by such considerations as would guide a court in a suit for the reasonable value of services rendered. It may consider the wages paid in the State for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards.

The commissioner may approve or disapprove the report of the wage board. If the commissioner disapproves, he may resubmit the matter to the same or a new board. In case the report is approved, the commissioner is to make a "directory order" which defines minimum "fair wage rates" and is to include appropriate administrative regulations. The latter may embrace regulations governing learners, apprentices, piece rates or their relation to time rates, overtime or part-time rates, bonuses or special pay for special or extra work, deductions for board, lodging and other items or services supplied by the employer, and other special conditions. Special licenses, authorizing employment at lower rates, may be issued to a woman or minor whose earning capacity is impaired by age or physical or mental deficiency or injury.

If the commissioner has reason to believe that an employer is not observing the provisions of the "directory order", he may, upon notice, summon the employer to show cause why his name should not be published as having failed to comply with the order. And, after hearing and in case of a finding of non-observance, the commissioner may cause the name of the employer to be published. After a "directory minimum fair wage order" has been in effect for nine months, if it appears that there has been persistent non-observance, notice may be given of the intention to make the order

mandatory and of a public hearing at which all persons in favor of, or opposed to, such a mandatory order may be heard. And it is after such hearing that the commissioner may make the previous directory order or any part of it mandatory and publish it accordingly.

It is disobedience to such a mandatory order which is punished by fine or by imprisonment. It is the violation of such an order, made after the inquiries, report, the tentative order, and the hearings which the statute enjoins, that is the basis of the prosecution in the case at bar.

Second.—In reaching its conclusion, the state court construed the opinion in the *Adkins* case and deemed that ruling applicable here. That, however, is a construction of the decision of this Court. That construction is not binding upon us.

When the opinion of the state court is examined in order to ascertain what construction was placed upon the statute, we find little more than a recital of its provisions. The state court says: "The New York act, as above stated, prohibits an oppressive and unreasonable wage, which means *both* less than the fair and reasonable value of the services rendered *and* less than sufficient to meet the minimum cost of living necessary for health". This is a repetition of the words of the statute in subdivision 7 of section 551 defining an "oppressive and unreasonable wage".' The court adds: "The act of Congress [in the *Adkins* case] had one standard, the living wage; this State act has added another, reasonable value. The minimum wage must include both. What was vague before has not been made any clearer. One of the elements, therefore, in fixing the fair wage is the very matter which was the basis of the congressional act". But the court expressly recognizes that a wage is not denounced by the New York act as "oppressive and unreasonable" unless it is less than the fair and reasonable value of the services rendered. The statute also provides in explicit terms that the "fair wage" which is to be prescribed is one that is "fairly and reasonably commensurate with the value of the service or class of service rendered". I find nothing in the opinion of the state court which can be taken to mean that this definite provision of the statute is not obligatory upon the authorities fixing a fair wage. Certainly, the court has not said so, and I think that we must assume that the standard thus described is set up by the New York

act. And there is no suggestion that the "fair wage" as prescribed in the instant case was not commensurate with the reasonable value of the service rendered by the employees.

When the opinion of the state court goes beyond the statement of the provisions of the act, and says that the setting up of such a standard does not create a material distinction when compared with the Act of Congress in the *Adkins* case, the state court is not construing the state statute. It is passing upon the effect of the difference between the two acts from the standpoint of the Federal Constitution. It is putting aside an admitted difference as not controlling. It is holding, as the state court says, that "Forcing the payment of wages at a reasonable value does not make inapplicable the principle and ruling of the *Adkins* case".

That, it seems to me, is clearly a federal and not a state question, and I pass to its consideration.

Third.—The constitutional validity of a minimum wage statute like the New York act has not heretofore been passed upon by this Court. As I have said, the required correspondence of the prescribed "fair wage" to the reasonable value of the service which the employee performs stands out as an essential feature of the statutory plan. The statute for the District of Columbia which was before us in the *Adkins* case did not have that feature. That statute provided for a minimum wage adequate "to supply the necessary cost of living to women workers" and "to maintain them in health and to protect their morals". 40 Stat. 963. The standard thus set up did not take account of the reasonable value of the service rendered. As this Court said, it compelled the employer "to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee". In the cases of *Murphy* v. *Sardell*, 269 U. S. 530, and *Donham* v. *West-Nelson Company*, 273 U. S. 657, the statutes of Arizona and Arkansas, respectively, were of a similar character, and both these cases were decided upon the authority of the *Adkins* case. New York and other States have been careful to adopt a different and improved standard, in order to meet the objection aimed at the earlier statutes, by requiring a fair equivalence of wage and service.

That the difference is a material one, I think is shown by the opinion in the *Adkins* case. That opinion contained a broad discussion of state power, but it singled out as an adequate ground

for the finding of invalidity that the statute gave no regard to the situation of the employer and to the reasonable value of the service for which the wage was paid. Upon this point the Court said (261 U. S. pp. 558, 559):

"The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do. The declared basis, as already pointed out, is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals. The ethical right of every worker, man or woman, to a living wage may be conceded. One of the declared and important purposes of trade organizations is to secure it. And with that principle and with every legitimate effort to realize it in fact, no one can quarrel; but the fallacy of the proposed method of attaining it is that it assumes that every employer is bound at all events to furnish it. The moral requirement implicit in every contract of employment, viz, that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. . . . A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things and solely with relation to circumstances apart from the contract of employment, the business affected by it and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States".

As the New York act is free of that feature, so strongly denounced, the question comes before us in a new aspect. The Court was closely divided in the *Adkins* case, and that decision followed an equal division of the Court, after reargument, in *Stettler* v. *O'Hara*, 243 U. S. 629, with respect to the validity of the minimum wage law of Oregon. Such divisions are at times unavoidable, but they point to the desirability of fresh consideration when there are material differences in the cases presented. The fact that in the *Adkins* case there were dissenting opinions maintaining the validity of the federal statute, despite the nature of the standard it set up, brings out in stronger relief the ground which was taken most emphatically by the majority in that case, and that there

would have been a majority for the decision in the absence of that ground must be a matter of conjecture. With that ground absent, the *Adkins* case ceases to be a precise authority.

We have here a question of constitutional law of grave importance, applying to the statutes of several States in a matter of profound public interest. I think that we should deal with that question upon its merits, without feeling that we are bound by a decision which on its facts is not strictly in point.

Fourth.—The validity of the New York act must be considered in the light of the conditions to which the exercise of the protective power of the State was addressed.

The statute itself recites these conditions and the State has submitted a voluminous factual brief for the purpose of showing from various official statistics that these recitals have abundant support. Judge Lehman, in his dissenting opinion in the Court of Appeals, states that the relator "does not challenge these findings of fact by the Legislature, nor does he challenge the statements in the 'factual brief' submitted by the respondent to sustain and emplify these findings". The majority opinion in the Court of Appeals has nothing to the contrary. Nor is the statement of the conditions which influenced the legislative action challenged, or challengeable, upon the record here. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78-80; *Radice* v. *New York*, 264 U. S. 292, 294; *Clarke* v. *Deckebach*, 274 U. S. 392, 397; *O'Gorman & Young* v. *Hartford Insurance Co.*, 282 U. S. 251, 257, 258; *Nebbia* v. *New York*, 291 U. S. 502, 530; *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 209.

The Legislature finds that the employment of women and minors in trade and industry in the State of New York at wages unreasonably low and not fairly commensurate with the value of the services rendered is a matter of vital public concern; that many women and minors are not as a class upon a level of equality in bargaining with their employers in regard to minimum fair wage standards, and that 'freedom of contract' as applied to their relations with employers is illusory; that, by reason of the necessity of seeking support for themselves and their dependents, they are forced to accept whatever wages are offered; and that judged by any reasonable standard, wages in many instances are fixed by chance and caprice and the wages accepted are often found to bear

no relation to the fair value of the service. The Legislature further states that women and minors are peculiarly subject "to the overreaching of inefficient, harsh or ignorant employers", and that, in the absence of effective minimum fair wage rates, the constant lowering of wages by unscrupulous employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers and threatens the stability of industry. The Legislature deemed it essential to seek the correction of these evils by the exercise of the police power "for the protection of industry and of the women and minors employed therein and of the interest of the community at large in their health and well-being and in the prevention of the deterioration of the race". Sec. 550.

In the factual brief, statistics are presented showing the increasing number of wage earning women, and that women are in industry and in other fields of employment because they must support themselves and their dependents. Data are submitted, from reports of the Women's Bureau of the United States Department of Labor, showing such discrepancies and variations in wages paid for identical work as to indicate that no relationship exists between the value of the services rendered and the wages paid. It also appears that working women are largely unorganized and that their bargaining power is relatively weak. The seriousness of the social problem is presented. Inquiries by the New York State Department of Labor in cooperation with the Emergency Relief Bureau of New York City disclosed the large number of women employed in industry whose wages were insufficient for the support of themselves and those dependent upon them. For that reason they had been accepted for relief and their wages were being supplemented by payments from the Emergency Relief Bureau. Thus the failure of overreaching employers to pay to women the wages commensurate with the value of services rendered has imposed a direct and heavy burden upon the taxpayers. The weight of this burden and the necessity for taking reasonable measures to reduce it, in the light of the enormous annual budgetary appropriation for the Department of Public Welfare of New York City, is strikingly exhibited in the brief filed by the Corporation Counsel of the City as an *amicus curiae*.

We are not at liberty to disregard these facts. We must assume that they exist and examine respondent's argument from that standpoint. That argument is addressed to the fundamental postulate of liberty of contract. I think that the argument fails to take account of established principles and ignores the historic relation of the State to the protection of women.

Fifth.—We have had frequent occasion to consider the limitations of liberty of contract. While it is highly important to preserve that liberty from arbitrary and capricious interference, it is also necessary to prevent its abuse, as otherwise it could be used to override all public interests and thus in the end destroy the very freedom of opportunity which it is designed to safeguard.

We have repeatedly said that liberty of contract is a qualified and not an absolute right. "There is no absolute freedom to do as one wills or to contract as one chooses. . . . Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community". *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549, 567. The numerous restraints that have been sustained have often been recited. *Id.*, p. 568. *Nebbia* v. *New York*, *supra*, pp. 526-528. Thus we have upheld the limitation of hours of employment in mines and smelters (*Holden* v. *Hardy*, 169 U. S. 366); the requiring of redemption in cash of store orders or other evidences of indebtedness issued in payment of wages (*Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13); the prohibition of contracts for options to sell or buy grain or other commodities at a future time (*Booth* v. *Illinois*, 184 U. S. 425); the forbidding of advance payments to seamen (*Patterson* v. *Bark Eudora*, 190 U. S. 169); the prohibition of contracts to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine (*McLean* v. *Arkansas*, 211 U. S. 539); the regulation of the size and weight of loaves of bread (*Schmidinger* v. *Chicago*, 226 U. S. 578; *Peterson Baking Co.* v. *Bryan*, 290 U. S. 570); the regulation of insurance rates (*German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389; *O'Gorman & Young* v. *Hartford Insurance Co.*, *supra*); the regulation of the size and character of packages in which goods are sold (*Armour & Co.* v. *North Dakota*, 240 U. S. 510); the limitation of hours of employment in manufacturing establishments with a specified al-

lowance of overtime payment (*Bunting* v. *Oregon*, 243 U. S. 426); the regulation of sales of stocks and bonds to prevent fraud (*Hall* v. *Geiger-Jones Co.*, 242 U. S. 539); the regulation of the price of milk (*Nebbia* v. *New York, supra*). The test of validity is not artificial. It is whether the limitation upon the freedom of contract is arbitrary and capricious or one reasonably required in order appropriately to serve the public interest in the light of the particular conditions to which the power is addressed.

When there are conditions which specially touch the health and well-being of women, the State may exert its power in a reasonable manner for their protection, whether or not a similar regulation is, or could be, applied to men. The distinctive nature and function of women—their particular relation to the social welfare—has put them in a separate class. This separation and corresponding distinctions in legislation is one of the outstanding traditions of legal history. The Fourteenth Amendment found the States with that protective power and did not take it away or remove the reasons for its exercise. Changes have been effected within the domain of state policy and upon an appraisal of state interests. We have not yet arrived at a time when we are at liberty to override the judgment of the State and decide that women are not the special subject of exploitation because they are women and as such are not in a relatively defenceless position.

More than forty years after the adoption of the Fourteenth Amendment, we said that it did not interfere with state power by creating "a fictitious equality". *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 63. We called attention to the ample precedents in regulatory provisions for a classification on the basis of sex. We said—"It has been recognized with regard to hours of work. . . . It is recognized in the respective rights of husband and wife in land during life, in the inheritance after the death of the spouse. Often it is expressed in the time fixed for the coming of age. . . . The particular points at which that difference shall be emphasized by legislation are largely in the power of the State." *Id.* Not long before the decision in the *Quong Wing* case, the question had received elaborate consideration in *Muller* v. *Oregon*, 208 U. S. 412, where a regulation of the working hours of women was sustained. We thought that the disadvantage at which woman was placed in the struggle for subsistence was obvious and we emphasized the point that she "becomes an object of public interest

and care in order to preserve the strength and vigor of the race". We added that "though limitations upon personal and contractual rights may be removed by legislation", woman will still be in a situation "where some legislation to protect her seems necessary to secure a real equality of right". She therefore still may be "properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained". *Muller* v. *Oregon*, *supra*, pp. 421, 422. This ruling has been followed in *Riley* v. *Massachusetts*, 232 U. S. 671, *Miller* v. *Wilson*, 236 U. S. 373, and *Bosley* v. *McLaughlin*, 236 U. S. 385, with respect to hours of work, and in *Radice* v. *New York*, *supra*, in relation to night work.

If liberty of contract were viewed from the standpoint of absolute right, there would be as much to be said against a regulation of the hours of labor of women as against the fixing of a minimum wage. Restriction upon hours is a restriction upon the making of contracts and upon earning power. But the right being a qualified one, we must apply in each case the test of reasonableness in the circumstances disclosed. Here, the special conditions calling for the protection of women, and for the protection of society itself, are abundantly shown. The legislation is not less in the interest of the community as a whole than in the interest of the women employees who are paid less than the value of their services. That lack must be made good out of the public purse. Granted that the burden of the support of women who do not receive a living wage cannot be transferred to employers who pay the equivalent of the service they obtain, there is no reason why the burden caused by the failure to pay that equivalent should not be placed upon those who create it. The fact that the State cannot secure the benefit to society of a living wage for women employees by any enactment which bears unreasonably upon employers does not preclude the State from seeking its objective by means entirely fair both to employers and the women employed.

In the statute before us, no unreasonableness appears. The end is legitimate and the means appropriate. I think that the act should be upheld.

I am authorized to state that Mr. Justice BRANDEIS, Mr. Justice STONE and Mr. Justice CARDOZO join in this opinion.

SUPREME COURT OF THE UNITED STATES.

No. 838.—October Term, 1935.

Frederick L. Morehead, as Warden of the City Prison of the Borough of Brooklyn, Petitioner, *vs.* People *ex rel.* Joseph Tipaldo.	On Writ of Certiorari to the Supreme Court of the State of New York.

[June 1, 1936.]

Mr. Justice Stone.

While I agree with all that the Chief Justice has said, I would not make the differences between the present statute and that involved in the *Adkins* case the sole basis of decision. I attach little importance to the fact that the earlier statute was aimed only at a starvation wage and that the present one does not prohibit such a wage unless it is also less than the reasonable value of the service. Since neither statute compels employment at any wage, I do not assume that employers in one case, more than in the other, would pay the minimum wage if the service were worth less.

The vague and general pronouncement of the Fourteenth Amendment against deprivation of liberty without due process of law is a limitation of legislative power, not a formula for its exercise. It does not purport to say in what particular manner that power shall be exerted. It makes no fine-spun distinctions between methods which the legislature may and which it may not choose to solve a pressing problem of government. It is plain too, that, unless the language of the amendment and the decisions of this Court are to be ignored, the liberty which the amendment protects is not freedom from restraint of all law or of any law which reasonable men may think an appropriate means for dealing with any of those matters of public concern with which it is the business of government to deal. There is grim irony in speaking of the freedom of contract of those who, because of their economic necessities, give their service for less than is needful to keep body and soul together. But if this is freedom of contract no one has ever denied that it is freedom which may be restrained, notwithstanding the Fourteenth Amendment, by a statute passed in the public interest.

In many cases this Court has sustained the power of legislatures to prohibit or restrict the terms of a contract, including the price term, in order to accomplish what the legislative body may reasonably consider a public purpose. They include cases, which have neither been overruled nor discredited, in which the sole basis of regulation was the fact that circumstances, beyond the control of the parties, had so seriously curtailed the regulative power of competition as to place buyers or sellers at a disadvantage in the bargaining struggle, such that a legislature might reasonably have contemplated serious consequences to the community as a whole and have sought to avoid them by regulation of the terms of the contract. *Munn* v. *Illinois*, 94 U. S. 113; *Brass* v. *Stoeser*, 153 U. S. 391; *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389, 409; *Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S. 252; *Block* v. *Hirsh*, 256 U. S. 135; *Marcus Brown Co.* v. *Feldman*, 256 U. S. 170; *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242; *Nebbia* v. *New York*, 291 U. S. 502; see also, *Frisbie* v. *United States*, 157 U. S. 160; *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13; *McLean* v. *Arkansas*, 211 U. S. 539; *Mutual Loan Co.* v. *Martell*, 222 U. S. 225.

No one doubts that the presence in the community of a large number of those compelled by economic necessity to accept a wage less than is needful for subsistence is a matter of grave public concern, the more so when, as has been demonstrated here, it tends to produce ill health, immorality and deterioration of the race. The fact that at one time or another Congress and the legislatures of seventeen states, and the legislative bodies of twenty-one foreign countries, including Great Britain and its four commonwealths, have found that wage regulation is an appropriate corrective for serious social and economic maladjustments growing out of inequality in bargaining power, precludes, for me, any assumption that it is a remedy beyond the bounds of reason. It is difficult to imagine any grounds, other than our own personal economic predilections, for saying that the contract of employment is any the less an appropriate subject of legislation than are scores of others, in dealing with which this Court has held that legislatures may curtail individual freedom in the public interest.

If it is a subject upon which there is power to legislate at all, the Fourteenth Amendment makes no distinction between the

methods by which legislatures may deal with it, any more than it proscribes the regulation of one term of a bargain more than another if it is properly the subject of regulation. No one has yet attempted to say upon what basis of history, principles of government, law or logic, it is within due process to regulate the hours and conditions of labor of women, see *Muller* v. *Oregon*, 208 U. S. 412; *Riley* v. *Massachusetts*, 232 U. S. 671, 679; *Hawley* v. *Walker*, 232 U. S. 718; *Miller* v. *Wilson*, 236 U. S. 373; *Bosley* v. *McLaughlin*, 236 U. S. 385, and of men, *Bunting* v. *Oregon*, 243 U. S. 426, and the time and manner of payment of the wage, *McLean* v. *Arkansas*, *supra*; *Knoxville Iron Co.* v. *Harbison*, *supra*; *Patterson* v. *Bark Eudora*, 190 U. S. 169; compare *New York Central R. R. Co.* v. *White*, 243 U. S. 188; *Arizona Employers Liability Cases*, 250 U. S. 400, but that regulation of the amount of the wage passes beyond the constitutional limitation; or to say upon what theory the amount of a wage is any the less the subject of regulation in the public interest than that of insurance premiums, *German Alliance Insurance Co.* v. *Kansas*, *supra*, or of the commissions of insurance brokers, *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U. S. 251, or of the charges of grain elevators, *Munn* v. *Illinois*, *supra*; *Brass* v. *Stoeser*, *supra*, or of the price which the farmer receives for his milk, or which the wage earner pays for it, *Nebbia* v. *New York*, *supra*.

These considerations were developed at length in *Tyson* v. *Banton*, 273 U. S. 418, 447 *et seq.*, and in *Ribnik* v. *McBride*, 277 U. S. 350, 359, *et seq.*, and need not be further elaborated now. It is true that the Court rejected them there, but it later accepted and applied them as the basis of decision in *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, *supra*; *Nebbia* v. *New York*, *supra*; *Hegeman Farms Corporation* v. *Baldwin*, 293 U. S. 163; *Bordens Farm Products Co.* v. *Ten Eyck*, No. 597, decided February 10, 1936. Both precedent, and, what is more important, reason, require their acceptance now. See *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 405. In upholding minimum state price regulation in the milk industry, in *Nebbia* v. *New York*, *supra*, the Court declared, p. 537:

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation

adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio.*" That declaration and decision should control the present case. They are irreconcilable with the decision and most that was said in the *Adkins* case. They have left the Court free of its restriction as a precedent, and free to declare that the choice of the particular form of regulation by which grave economic maladjustments are to be remedied is for legislatures and not the courts.

In the years which have intervened since the *Adkins* case we have had opportunity to learn that a wage is not always the resultant of free bargaining between employers and employees; that it may be one forced upon employees by their economic necessities and upon employers by the most ruthless of their competitors. We have had opportunity to perceive more clearly that a wage insufficient to support the worker does not visit its consequences upon him alone; that it may affect profoundly the entire economic structure of society and, in any case, that it casts on every taxpayer, and on government itself, the burden of solving the problems of poverty, subsistence, health and morals of large numbers in the community. Because of their nature and extent these are public problems. A generation ago they were for the individual to solve; today they are the burden of the nation. I can perceive no more objection, on constitutional grounds, to their solution by requiring an industry to bear the subsistence cost of the labor which it employs, than to the imposition upon it of the cost of its industrial accidents. See *New York Central R. R. Co.* v. *White, supra; Mountain Timber Company* v. *Washington,* 243 U. S. 119.

It is not for the courts to resolve doubts whether the remedy by wage regulation is as efficacious as many believe, or is better than some other, or is better even than the blind operation of uncontrolled economic forces. The legislature must be free to choose unless government is to be rendered impotent. The Fourteenth Amendment has no more embedded in the Constitution our preference for some particular set of economic beliefs than it has adopted, in the name of liberty, the system of theology which we may happen to approve.

I know of no rule or practice by which the arguments advanced in support of an application for certiorari restrict our choice between conflicting precedents in deciding a question of constitutional law which the petition, if granted, requires us to answer. Here the question which the petition specifically presents is whether the New York statute contravenes the Fourteenth Amendment. In addition, the petition assigns as a reason for granting it that "the construction and application of the Constitution of the United States and a prior decision" of this Court "are necessarily involved," and again, that "the circumstances prevailing under which the New York law was enacted call for a reconsideration of the *Adkins* case in the light of the New York act and conditions aimed to be remedied thereby." Unless we are now to construe and apply the Fourteenth Amendment without regard to our decisions since the *Adkins* case, we could not rightly avoid its reconsideration even if it were not asked. We should follow our decision in the *Nebbia* case and leave the selection and the method of the solution of the problems to which the statute is addressed where it seems to me the Constitution has left them, to the legislative branch of the government. The judgment should be reversed.

Mr. Justice BRANDEIS and Mr. Justice CARDOZO join in this opinion.